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**THE ADAPTATION OF INTERNATIONAL LAW TO NEW
GENERATIONS OF INTERNATIONAL CONFLICTS AND CHANGES
IN INTERNATIONAL POLICY IN RESPONSE AND FIGHT AGAINST
THE INTERNATIONAL TERRORISM**

TAIB AZIZ SADIQ KASNAZANY

**A thesis submitted to the University of Huddersfield
in partial fulfilment of the requirements for
the degree of Doctor of Philosophy**

January 2020

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Abstract

This study examines the complex, important, yet unclear responses to terrorism within the framework of international law. The question of who is a terrorist depends to a significant extent on the subjective outlook of the definer and many researchers tend to believe that an objective and internationally accepted definition of terrorism can never be agreed upon. The aims of terrorism and guerrilla warfare may well be the same, but they are distinguished from each other by the targets of their operations. A lawful cause does not act to legitimate the means and methods used; therefore, this research examines, in particular, the *jus ad bellum* and the *jus in bello* applicable when peoples actively practise their right to self-determination, and the relationship between the struggle for self-determination and terrorism.

The thesis explores ideas and disagreements over definitions of what constitutes terrorist activity. Such problems are tracked by discussing the background and history of terrorism and responses to terrorism, and the thesis considers how these manifests in debates around definitions of armed conflict and their relationship to war crimes, and the reasons which made it impossible to include terrorism within the jurisdiction of the International Criminal Court.

Finally, the thesis considers the unfolding developments around the problem of foreign terrorist fighters, and UN Security Council policy and practice on this issue including concerning how the law seems to be changing in this field and what the implications might be for humanitarian action. Furthermore, this thesis discusses the question of what should be done to address the threats caused by the return of foreign terrorist fighters and whether the measures issued by international bodies such as Security Council Resolution 2178 are sufficient. The concluding part of the thesis makes recommendations aimed at improving the international legal framework.

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Final word counts (84,628 words)

List of Abbreviations

- **ANC** African National Congress
- **ANF** Al-Nusrah Front
- **AP** Additional Protocol
- **ASEAN** Association of South East Asian Nations
- **ASP** Assembly of States Parties
- **CIA** Central Intelligence Agency
- **DoD** Department of Defence
- **ECHR** European Court of Human Rights
- **ERP** People's Revolutionary Army
- **ETA** Basque Country and Freedom
- **ETLO** East Turkestan Liberation Organization
- **FATF** Financial Action Task Force
- **FBI** Federal Bureau of Investigation
- **FNLA** National Front for the Liberation of Angola
- **FSA** Free Syrian Army
- **FTF** Foreign Terrorist Fighters
- **GA Res** General Assembly Resolution
- **GC** Geneva Conventions
- **HC** Hague Convention
- **IAC** International Armed Conflicts
- **ICC** International Criminal Court
- **ICCPR** International Covenant on Civil and Political Rights
- **ICESCR** International Covenant on Economic, Social and Cultural Rights
- **ICI** International Commission of Inquiry
- **ICJ** International Court of Justice
- **ICPPT** International Convention for the Prevention and Punishment of Terrorism
- **ICRC** International Committee of the Red Cross
- **ICTR** International Criminal Tribunal for Rwanda
- **ICTY** International Criminal Tribunal for the former Yugoslavia
- **IDF** Israeli Defence Forces
- **IHL** International Humanitarian Law

- **IHRL** International Human Rights Law
- **ILC** International Law Commission
- **IMF** International Monetary Fund
- **IMT** International Military Tribunal
- **IO** International Organisation
- **IRA** Irish Republican Army
- **ISIL** Islamic State of Iraq and the Levant
- **ISIS** Islamic State of Iraq and Syria
- **LN** League of Nations
- **LTTE** Liberation Tigers of Tamil Eelam
- **MI5** Military Intelligence, Section 5
- **MPLA** People's Movement for the Liberation of Angola
- **NATO** North Atlantic Treaty Organization
- **NGO** Non-Governmental Organisation
- **NIAC** Non- International Armed Conflicts
- **PA** Palestinian Authority
- **PKK** Kurdistan Workers' Party- in Kurdish -Party Krekarani Kurdistan
- **PLC** Palestinian Legislative Council
- **PLO** Palestine Liberation Organization
- **POW** Prisoner Of War
- **STL** Special Tribunal for Lebanon
- **UK** United Kingdom
- **UN** United Nations
- **UNMIK** United Nations Interim Administration Mission in Kosovo
- **UNODC** United Nations Office on Drugs and Crime
- **USA** United States of America
- **USSR** Union of Soviet Socialist Republics
- **VCLT** Vienna Convention on the Law of Treaties
- **WGIP** Working Group on Indigenous Populations
- **YPG** Yekîneyên Parastina Gel- in English(People's Protection Units)

Chapter One

Introduction & Research Context

1.0 Overview & Background

Many scholars, academics and legal experts have pointed out that terrorism is one of the most controversial legal and political issues facing the international community at present. For many years it has been the subject of numerous legal studies aiming to clarify the phenomenon and finding an effective international response to counter international terrorism. However, how could the international community punish an offense whose definition remains uncertain and the acts that constitute it are varied? Is it possible to repress in the same way a “nationalist terrorism” whose structures are based on deep historical and ideological national roots with international terrorism? And in the event that several forms of terrorism occur in the same territory, will it be necessary to adopt a differential treatment according to the specificity of the terrorism that one seeks to fight?

On the international scene despite the many international efforts to counter international terrorism, before and after the establishment of the United Nations (UN), none of the proposed definitions has received unanimous. This problem appeared as early as 1937, when international efforts to promulgate the International Convention for the Prevention and Punishment of Terrorism (ICPPT) adopted under the auspices of the League of Nations (LN) failed because of the outbreak of the Second World War. Since this attempt, the international community has addressed the issue of terrorism which threatens both the lives of innocent people (hijackings, suicide attacks, etc.) and the stability of international relations (attacks on protected persons, etc.) by type of offense or type of problem rather than in a comprehensive manner. The United Nations has never developed a unique definition of terrorism that clearly represses the various terrorist activities that harm life, freedom, democratic society, social peace and public order.

According to the definition of the Convention for the Suppression of the Financing of Terrorism,¹ terrorist act means not only all acts covered by international conventions but also: *"Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the*

¹ See the International Convention for the Suppression of the Financing of Terrorism, December 9, 1999.

purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act ².

However, this UN definition is general and it does not encompass all forms of terrorism. In the face of this legal gap in the definition of international terrorism, many delegations called for a legal definition of terrorism in a comprehensive international convention on terrorism. In order to fight against terrorism different departments should cooperate with each other. Cooperation is the key word of the United Nations resolutions in this area. According to them, an effective fight against terrorism goes hand in hand with the development of close cooperation between States, international organizations and regional organizations. In this context, the international organization plays a coordinating role. The purpose of international cooperation is to repress the organization, encouragement, financing and tolerance of terrorist activities from one territory against other States. Co-operation between all States in this area begins with an exchange of information to clarify groups financing terrorists or acts of terrorism. It is then based on effective judicial cooperation to facilitate investigations by police and law enforcement agencies, such as general intelligence, the establishment of extradition agreements for suspects or recognized perpetrators of terrorist acts. Also necessary support measures leading to the establishment of domestic instruments, new anti-terrorism laws and provisions in line with those provided for in international treaties. While there is no comprehensive definition of terrorism in the United Nations until now, it is quite clear that the UN views terrorism in a number of relevant resolutions as criminal and unjustifiable regardless of the perpetrator, wherever it occurs, and regardless of its political, philosophical, religious, racial, ideological or ethnic motives. Should we fear a confrontation with the demand for the implementation of a fundamental principle set forth in the United Nations Charter which is the absolute right of peoples to self-determination, as well as the consequences of the search for the independence in case of foreign occupation³? How can we distinguish between repressive terrorism and the struggle of peoples for self-determination? This is another point which the General Assembly has not settled and required further study. Countering terrorism will only be effective to the extent that United Nations member states deal permanently with the causes of terrorism. In this respect, Kofi Annan, the former Secretary-General of the United Nations, reminded us that we must tackle the roots of

² Article 2(b) of the International Convention for the Suppression of the Financing of Terrorism, 9th Dec, 1999.

³ See resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly, adopted at the 947th meeting, on 14 December 1960.

terrorism, which are poverty, ignorance and unresolved conflicts such as the Israeli-Palestinian conflict⁴.

The United Nations remains the only forum for promoting counterterrorism and international cooperation at the global level. But the legal approach developed by this organization remains very sectoral and provides only little by little solutions to the global problem of terrorism. These solutions provided for in many UN conventions and resolutions tend to combat certain problems related to terrorist activities such as arms and drug trafficking, money laundering and disruption of global communications networks. The lack of a comprehensive legal definition of terrorism appears as a gap in international law. The development of a comprehensive convention would establish the international framework for cooperation in the field of terrorism and complement existing legal instruments⁵.

Although due to some changes that were made in national as well as international level still there are several reasons where the international community wants to make changes. It has been discovered that those persons who are in charge of fighting terrorism at the international scene show their strength that a few countries observe it as “terrorism” despite the fact that others do not do this deep understanding as an early step towards overcoming the misperception that overcomes. In this thesis, the link will be explored between terrorism, right to self-rule and freedom movement. Regarding view of the present situation of the world particularly the Middle East and North Africa, it is critical to return to the concept and idea of self-determination. Especially some rights regarding international law such as rights of self-rule should not be underestimated⁶.

While the term terrorism is originally defined as the act that is committed by the government usually it is done by killing civilian population. Their main goal can only be to get political gains or they can terrorize people and not to allow any against political regime against them. Most of the government led terrorist activities can have a political purpose this may affect these activities as they will back terrorist group or may be positive with their ideology. Some governmental official, define the term terrorism as a use of standard of the illegitimacy or

⁴ See Statement by Kofi Annan to Security Council to commemorate one-year anniversary of Committee on Counter-Terrorism, 04 October 2002.

⁵ Amble, J.C., 2012. Combating terrorism in the new media environment. *Studies in Conflict & Terrorism*, 35(5), pp.339-353.

⁶ Lesser, I., Arquilla, J., Hoffman, B., Ronfeldt, D.F. and Zanini, M., 1999. Countering the new terrorism. RAND corporation.

unlawfulness of the act⁷. As far as the whole world is concerned terrorism has become an increasing problem for the entire international community. A lot of international terrorism cases have been judged by domestic courts. International terrorism and violence cases have conventionally resolved in the national courts. In this thesis, the different types of tribunals will be explained about terrorism and their limitations in giving judgments⁸. This thesis will also look at the history as well as the culture of International Criminal Court. The crimes that are presently under the authority and domain of the ICC will be thoroughly argued in turn along with an assessment and evaluation of whether specific acts of terrorism and violence fall inside the legal definitions of such type of crimes⁹.

The term terrorism is can be dealt with collaboration with international bodies¹⁰. On September 24, 2014, the United Nations Security Council, in a meeting chaired by US President Obama, approved the resolution 2178, by imposing on States the adoption of measures against foreign terrorist fighters. A series of legislation has recently been passed to give States the power to prevent what is called terrorism related travel. However, the definitions are vague and the rules are prone to being interpreted in a variety of ways. The constant reinvention of definitions means that we could be talking about the same piece of international law but at the national level there's more than one way of interpreting it. Therefore, many of international law scholar, academic and experts are involved in analyzing and understanding any new resolution that the UN Security Council passes like resolution 2178. It demands that all states make it a serious criminal offense for their citizens to travel abroad to fight with terrorist organizations or to recruit and fund others to do so. It is necessary in this regard this thesis to discuss the Res. 2178 in the context outlined in particular by the Res. 2170 (2014) and 2199 (2015), which contain a series of measures aimed primarily at freezing up the funding sources of the Islamic State in Iraq and the Levant (ISIL), which took control of large territories in Syria and Iraq¹¹.

⁷ Weiss, T.G., 2011. United Nations and changing world politics., p121

⁸ Baylis, J., Smith, S. and Owens, P., 2013. The globalization of world politics: An introduction to international relations. Oxford University Press.

⁹ Duyvesteyn, I., 2004. How new is the new terrorism?. Studies in Conflict & Terrorism, 27(5), pp.439-454.

¹⁰ Hoffman, B., 1996. Intelligence and terrorism: Emerging threats and new security challenges in the post-cold war era. Intelligence and National Security, 11(2), pp.221-223.

¹¹ Foreign terrorist fighters, Security Council Counter Terrorism Committee.

1.1 Inspiration and motivation for the topic

The main inspiration for the research and the rationale for this particular choice of topic by confining effort to find lasting legal and practical solutions to the problems of combating international conflicts.

The principle of the right of peoples to self-determination in their practical and legal framework has been established, not only a principle of international law but also a right to be exercised through national liberation movements. The concept of terrorism is often confused with the activities of liberation movements (as they share the use of force), which necessitates a distinction between them in respect of activities that contribute to the self-determination and independence of peoples, and not to allow colonizing states and regimes to invoke counter-terrorism in the elimination and destruction of these movements.

This research aims and attempts to establish simplified, clear and direct criteria for distinguishing and analyzing legally between the armed struggle (liberation movements), which is considered legitimate in international law, and terrorist acts which are considered illegal and violation of international law. Especially in light of the vague policies practiced by the major powers and individuals who fight against terrorism in their countries, so that they will be able to label those whom they want to be legitimate and describe those whom they want to be labelled as terrorists according to their interests and desires. For example; PKK in Turkey (Kurdish Liberation Movement) considered as a terrorist organisation, however, on the other hand, YPG in Syria, which is a sub-section of PKK in Syria, consider as a liberation movement due to the fact that they are fighting against ISIS alongside with the other international coalition armies.

1.2 Research statement and questions

The purposes of this thesis are to critically analyse, explain and to seek a clarification of the concept of the term of international terrorism.

There are some general questions that this study attempts to answer;

[1] How has the term terrorism been formed in addition to what are the factors that emerge as of the policy along with legislations to replies and measure their observations about the overall idea and concept of terrorism?

These questions are addressed as part of the discussion in chapter two.

[2] This research will also explore the linkage between terrorism, the right to self-determination and Liberation Movement. Does the one who call himself a freedom fighter is

liable for the death of civilians if these occur during any liberation movement? Can a terrorist group claim to be a 'freedom fighter' merely for the reason that it fights for national liberation but then again terrorism allowed in the provision of self-rule as the aims and objectives of terrorism along with guerrilla fighting might well be equal?

These questions are addressed as part of the discussion in chapter three.

[3] In addition, the difficulty raised the question of the absence in international law of a general convention on terrorism, and of the absence of a general legal definition of acts of this type and how can terrorism be defined? Is it not necessary to distinguish terrorism from the struggle of peoples against oppression and self-determination? Should we not also differentiate between terrorism and organized crime, as well as individual terrorism and state terrorism? Finally, in order to fight against terrorism, is it possible to consider it legally as an armed aggression and thus resort to armed force? Could its constitutive elements qualify it as a crime against humanity?

These questions are addressed as part of the discussion in chapter four.

[4] This study will also critically analyse the issue of foreign terrorist fighter and what are the implications might be for humanitarian action in the recent developments in this field. It will also discuss the qualification as terrorists of the foreign fighters according to the Res. 2178 (2014). Also to identify who are the foreign terrorist fighters? The question of what should be done to address the threats caused by the return of foreign terrorist fighters and are the measures issued by international bodies such as Security Council Resolution 2178 sufficient? Or should specific measures be devised for the processing of returns?

These questions are addressed as part of the discussion in chapter five.

[5] This study therefore addresses two additional central questions; are the current existing treaties to counter terrorism well designed and do they receive enough recognition and effective implementation? Are there remaining gaps which could be filled by way of further specific conventions?

1.3 Hypotheses

In recent eras, some nations have been targeted by terrorist activities. Terrorism through it is one of the most diverse forms of expression along with cruelty which is a dramatic act of violence that you can see all over history (conquests, wars). Terrorism is, as a result, both domestically as well as globally, and in a method open to all vicious, humiliating and threatening acts and applied deprived of any reservation or moral distress. Due to these

reasons, where the life of innocent individuals totally unaware of that "war" or varied interests lose and the world is surprised daily by news of attacks happened on public roads¹². The negative identity hypothesis declares that failure, in order to attain a submissive role leads towards the supposition of a negative identity (i.e., a terrorist character). So this is regarded as one of the most difficult form of violence to contain for the reason that its scope extends beyond the battle regions¹³. It is a phenomenon that is regarded as indiscriminating violence and by legal provisions; the terrorist acts and action must be answered covering prevention along with punishment¹⁴.

The events of 11 September 2001 revealed many inadequacies in the international legal order, and the rules of international law remained silent as to the management of the follow-up to acts of aggression. The legal experts came to the conclusion that it was not possible in law to legally define or qualify such terrorist acts. The Security Council, at its 4730th meeting, adopted resolution 1368¹⁵, condemned these attacks as a "threat to international peace and security and called on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these acts and declared ready to take all necessary measures to respond to the terrorist attacks of 11 September "¹⁶.

In this respect, the Security Council acting under Chapter VII of the Charter took decisions on 28 September 2001 binding on States. The UN Security Council Resolution 1373¹⁷ calls on states to prevent and punish the financing of terrorist acts to freeze funds and the financial assets or economic resources of those who commit or tend to commit acts of terrorism or to facilitate acts of terrorism, and to cooperate by applying all conventions relating to terrorism¹⁸. Terrorism, whatever its form, may appear as a violent attack on democracy and the rule of law. In this sense, Walter Schwimmer, the Secretary General of the Council of Europe, states that terrorism "is a violation of the most fundamental principles of humanity, a disregard for the moral codes of all cultures and a failure to religions worldwide "¹⁹.

¹² Hoffman, B., 2001. Change and continuity in terrorism. *Studies in Conflict and Terrorism*, 24(5), pp.417-428.

¹³ Cooper, B., 2005. *New political religions or an analysis of modern terrorism*(Vol.1). University of Missouri Press.

¹⁴ Hoffman, B., 2002. Rethinking terrorism and counterterrorism since 9/11. *Studies in Conflict and Terrorism*, 25(5), pp.303-316.

¹⁵ UN Resolution 1368 adopted by the Security Council on 12 September 2001, S / RES / 1368 (2001).

¹⁶ Ibid.

¹⁷ UN Resolution 1373 adopted by the Security Council on 28 September 2001, S / RES / 1373 (2001).

¹⁸ Stanislav J. Kirschbaum ,2004. *Terrorism and International Security*, Bruylant, Brussels, p. 89-177.

¹⁹ The fight against terrorism, the standards of the Council of Europe, Council of Europe, Strasbourg, February 2004, p. 1.

In the era of globalization, terrorists have taken advantage of the opening of borders, the establishment of free trade zones, the free movement of capital and modern means of communication to increase their influence. But how to fight cross-border terrorist groups when terrorism is not legally defined? What kind of response is envisaged against these criminals when no independent convention on terrorism exists on the international scene? The rules of international law have remained silent as to the management of the action to be given to terrorist acts. Discussions at both the European Council and the United Nations had shown the difficulty of reaching such a definition at the time.

The attacks of September 11 raised the question of their definition as well as that of their qualification. This legal gap reflected the difficulty of dealing with the situation faced by lawyers because the existing conventions on terrorism were not applicable to the case. Given the absence of a legal definition of terrorism, the following questions arise: What is terrorism legally? What are its legal aspects? Who are the terrorists according to international law? What are the acts and intent elements of the terrorist offense? What is the criminal approach to the notion of terrorism? What is the link between terrorists and freedom fighters? What are their means? Are the September 11 terrorist attacks truly "acts of war" as former US President George W. Bush has said? What is the legal difference between an "act of war" and a "terrorist act"? Can the response of the United States be equated with a "war on terror"?

These issues of legal criterion are also substantive issues as each involves different legal reflections, distinct political interpretations and more or less similar international and state consequences. Before analyzing all these legal issues in this thesis, we need to explain and analyze in this introduction the methodology with an aim to provide sufficient answers to the research questions and problem.

1.4 Research Methodology

At the beginning of the research one of the key considerations is what type of methodology to adopt for the study. The different types of methodologies were reviewed over a period of three to four months. The purpose of the review was to identify which research methods were most suitable for the research exercise. The section below contains a brief outline of various methods reviewed and whether or not they appropriate for this research. The methodology will advance the reader's understanding of how the research has been framed and what tools

has been applied and why²⁰. This section also identifies why the research design has been constructed in the way it has throughout the thesis, and a justification for why the comparative approach has been deemed appropriate will be presented and for the researcher to find out gaps in the literature which this research will seek to address. Given the nature of this topic and the study, ethical considerations are not relevant to this study.

Generally, there are three main methodological approaches in social sciences research currently exist; namely quantitative, qualitative or a mixed methods design. According to Anthony W. Heath; *“Qualitative researchers attempt to describe and interpret some human phenomenon, often in the words of selected individuals (the informants). These researchers try to be clear about their biases, presuppositions, and interpretations, so that others can decide what they think about it all”*²¹. Qualitative method is, therefore, any form of research that makes findings not reached at by statistical approach or other means of quantification. Qualitative research leverages on different sources of data, such as; observations, documents, films, and even quantitative data. Qualitative method can be a particularly useful approach to studying educational problems that requires developing an understanding of complex social environments and the meaning that people within those environments bring to their experience²².

On the other hand, quantitative research is the type of research that the general purpose is to explain, predict, investigate relationships, and describe current conditions or to examine possible impacts or influences on designated outcomes. When together qualitative and quantitative methods coexist in the same study, the resulting combination is called "mixed methods research". The mixed method research is a research procedure that utilizes jointly qualitative and quantitative methods²³.

²⁰ Mouton, J & Marais, H C, 1990. Basic concepts in the methodology of the social sciences, Pretoria: Human Sciences Research Council.

²¹ Heath, A. W. 1997. The Proposal in Qualitative Research . *The Qualitative Report*, 3(1), 1-4.

²² Bryman, A. 2006, Integrating Qualitative and Quantitative Research: How is it Done? *Qualitative Research*, 6(1), 97-113.

²³ Creswell, J. W. 2009. Research Design: Qualitative, Quantitative and Mixed Methods Approaches. Thousand Oaks: Sage.

Qualitative research differs from quantitative research in several ways; both methods typically address different problems arising from a different philosophical view of the world, work to achieve different goals and use different methods and design²⁴.

Following are some of the main differences between qualitative and quantitative approach. Qualitative research provides insights and understanding of the problem closely. Whereas, quantitative research quantifies the data and generalises the result from sample to target population. In qualitative research, the researcher is the main tool bringing her/his own perceptions to the selection and meaning of data. Quantitative research relies on external tools such as tests, surveys or other ways used to measure and quantify a particular phenomenon²⁵.

In quantitative research, the data collection process involves extensive data translated into numbers, an activity called quantification, analyzed through a mathematical and statistical process of interpretation. On the other hand, the data collection procedure in qualitative research requires intensive data on human phenomena, collected from multiple sources of evidence, and analyzed in a non-statistical manner. Qualitative research aims to explore and identify patterns, themes, hunches and initial models that provide an initial understanding of this phenomenon. Quantitative research is meant to test existing theory; while qualitative research aims at generating or building new theory²⁶.

Qualitative research usually uses a small sample to examine and explain experiences through the use of intensive descriptions of detailed data in an effort to know and interpret human perceptions. Quantitative research normally uses large samples to analyse numerical data by comparing or finding relationships among sample attributes so that the result can be generalized to the population²⁷.

However, the presentation of the above research methods in this section is not intended to be part of this discussion, but rather to highlight the characteristics and the differences of each research approach. Consequently, it is being carefully considered as a part of the research

²⁴ Thomas, R M & Brubaker, D L , 2000. Thesis and dissertations: a guide to planning, research, and writing. Westport, Conn: Bergin & Garvey.

²⁵ Ibid.

²⁶ Hathaway, R S 1995. Assumptions underlying quantitative and qualitative research: implications for institutional research. *Research in Higher Education* 36(5):535.

²⁷ Rihoux, B. 2006. Qualitative Comparative Analysis (QCA) and Related Systematic Comparative.

design but due to the nature of terrorism the above types of methods are not relevant to this study.

Finally, this thesis will utilise a comparative approach²⁸, which is an aspect of a qualitative methodology, to analyse different countries that have been targeted by terrorist attacks and those state anti-terrorism policies. This thesis will analyse those nations which are been targeted by the act of terrorism. This thesis will reflect on individual states that used strength alone to counter campaigns of terrorist attacks, and also compare as well as contrast the consequences of those campaigns that are related to counterterrorism through states that involved groups of terrorist. The data and sources which will be in this thesis will be official from the current case studies of specific terrorist campaigns among states rules and strategies versus the actions that are taken by states too²⁹.

This complete thesis will monitor a definite technique along with methodology with an aim to provide sufficient respond to the research problem and get to the points mentioned above. This research will completely use a documentary method, which helps the research to reach the objectives by the historical, critical, and comparative approach. This means using the documentary method will be based on the evaluation of published and unpublished resources, for example; books, journals, articles, and research papers to have more knowledge on the international terrorism. The historical approach explains the background overview of terrorism, liberation movement and the ICC. The critical approach is relevant for assess different explanations collected from literatures to build this study. This means critical and analysis approach is helpful to understand the state legislation and the international instruments. Ultimately, the comparative approach improves in order to understand the power of court and its functions along with its operations of the International Criminal Court, and other international criminal jurisdictions³⁰.

The analysis will focus on differentiate countries that exercised violence only to respond to terrorist attacks, and compare and contrast the results of those anti-terrorist campaigns with

²⁸ Ragin, Charles C. 1987, *the Comparative Method: Moving Beyond Qualitative and Quantitative Strategies*, Berkeley and London: University of California Press.

²⁹ Rehman, J., 2005. *Islamic state practices, international law and the threat from terrorism; a critique of the 'clash of civilizations' in the new world order*(Vol. 7). Hart Publishing.

³⁰ Laqueur, W, 2000. *The new terrorism: Fanaticism and the arms of mass destruction*. Oxford University Press on Demand.

states that engaged terrorist groups. The assessment of success of the anti-terrorism policies will be the intensity of violence of the terrorist attacks, and the length of the terrorist campaigns³¹. The discussion will now progress to examine the subject matter and definition of next chapter.

³¹ Ibid.

Chapter Two

Background and History of Terrorism

2.0 Introduction

This chapter will examine the conceptual and legal difficulty involve in the search for the generally accepted definition of the term of terrorism. In the general sense, terrorism is a phenomenon which impact on both political and social life and its definition as a crime cannot be separated from its political and social context. Therefore, each legal definition of terrorism as a crime should also reflect the context of the political and social culture to which it belongs. However, even adopting a “national” definition requires consensus among different segments of society and the ability to be modified according to prevailing conditions of the times. In this chapter, the focus of the discussion will be on the main obstacles encounter in trying to establish a common definition of the term terrorism. The main objective of this chapter is to address one of the research questions which state how is the concept of terrorism formed and what factors emerge from the policy and legislations to responses and how can perceptions about the concept of terrorism is measured? However, the question is what does terrorism concept means and when did terrorist actions begin affecting the states? This question will help determine the historical context and understanding of the term terrorism as well as the counter terrorism responses undertaken by the international community. In addition, the confusion between terrorism and other phrases such as “freedom fighting” and “liberation movement” continue .The difficulty of accurate labelling become even worse with the addition of the concept of “guerrilla warfare”. Therefore, this chapter will examine each term independently and clarify that the confusion between terrorism and those interchangeably used concepts.

2.1 The meaning of Terrorism

The word of terrorism in the dictionary comes into English from French *terreue* from Latin *terrorem* (terror) or a great fear a dread from the verb *terrere* which is to fill with fear or to frighten³². Thus terrorism has built into its very relevant meaning fear, fright or dread. The first use of the word terrorism comes from the 18th century French Revolution, when the

³² Burgess, Mark, 2003. A Brief History of Terrorism. Washington, D.C.: Centre for Defence Information (CDI).

word *terreisme* was used in 1798 to describe the activity of the French state and employing physical violence to control the subject population. At the root of our understanding of terrorism then is fear³³. Terrorism is an act that causes fear but of course not everything that causes fear can be called terrorism. This would be unreasonable, it would mean that parents are terrorists, teachers are terrorists and the person who nearly hits you in your car and causes your heart to race could also be called a terrorist. As we know this is not true, in order to label something terrorism or someone a terrorist we instead have to look at the historical context of actions and deeds that have been labelled as such and this leads us to the problem of perception, at the root of this perception is one's own view of the world.

The question is, for example, are there certain shared universal values or truths by which we can judge something to be an act of terrorism or do we have to look at each case individually at each act and each actor in isolation given their historical context. If we assume that murder is universally wrong and this is a doubtful assumption as we know naturally from our own experiences. For example if you kill someone who's attempting to do harm to you this is murder, we might call it self-defence but it is murder. If we return to the assumption say that murder though is universally wrong and a terrorist acts such as the recent bombing in Manchester which causes the loss of life then we can see that one of the essential part of terrorism is murder but what kind of murder. In the case of Manchester again it is murder for the sake of political gain. So what kind of political gain, if we believe that the bombers were motivated by ideology fighting in what is call the global jihad, then we have another element that helps us refine our view of terrorism. Ideology can be defined as a deeply held political or redundant religious belief that motivates one to act. Kirtley stated then terrorists are motivated by ideology to act in violent ways that induce fear that is terror in their conquered population³⁴.

What are some of the legal issues and responses relating to terrorism and can we perceive some basic shared human values such as the case of murder that has mentioned above. This is in fact seemed to unify human nature in some way shape or form. Most societies, both pre-industrial and modern, have a number of proscribed social behaviours and prescribed behaviours³⁵. These behaviours that are proscribed are at base wrong because they

³³ Tuman, Joseph S. 2009. *Communicating Terror: The Rhetorical Dimensions of Terrorism* (2nd ed.). Thousand Oaks, CA: Sage.

³⁴ Ariane Alzhara Kirtley 2017. *Development: the most sustainable anti-terrorism strategy*.

³⁵ Matusitz, Jonathan Andre, 1976. *Terrorism and Communication: A Critical Introduction*, USA, Library of Congress Cataloguing-in-Publication by SAGE Publication, Inc.

undermined the group's prospects of survival for example; murder, rape, incest, kidnapping, treason or rebellion which are considered morally wrong in most societies. Prescribed behaviours are positive actions which help bind the society together and help it physically survive like marriage, hunting, growing food, working or having children. These are encouraged by society because they're useful to its survival. So by mentioning these it helps to establish some kind of fundamental agreement of a shared humanity and perhaps even although this is more dubious of shared morality from which we can argue the right or wrong of terrorism and better help to classify it.

2.2 A brief historical background

The history of terrorism can be classified into three stages; pre-modern terrorism (early terrorist era), modern terrorism (French revolution and anarchism era, colonial era, leftist terrorism era), and post-modern terrorism (radical religious terrorism era).

2.2.1 Pre-Modern Terrorism (Ancient and Medieval Terrorism)

This section will briefly cover some aspects of ancient and medieval terrorism. Terrorism is an old profession, certainly in warfare and it has been an integral part of the human experience since earliest of times. Take an example from ancient times, the Assyrians from what is today northern Iraq were notorious for their brutality and shocking treatment of their enemies with their assaults on cities, looting and deportations of captive peoples immortalized in the Bible³⁶. The violence and fear associated with the Syrian attack spread far and wide and led to the surrender of many enemies without a fight. However, to discover something about terrorism in the remote past is difficult. Guerrilla fighters one sees in the ancient sources but individuals or groups who fit the broad definition of terrorism as propaganda of the deed are difficult to find. Some of the earliest acts of political violence were called *tyrannicide*, in which a political actor attacked a tyrant in the name of justice. Greek philosopher Aristotle thought deeply about the causes of *tyrannicide*, he noted that many men attacked tyrants because of a real or imagined insult often because they or someone they were related to had been shamed by the tyrant. Another cause states Aristotle is that the tyrant has made a shameful attempt on a person of his subjects often sexual or another moral violation. He also further notes that many who attempted to murder tyrants have been personally injured, beaten, or tortured by the princes whom they then try to kill. In

³⁶ Martin, G. 2003. *Understanding Terrorism: Challenges, Perspectives, and Issues*. Thousand Oaks, CA: Sage Publications, p, 2.

other words the state is seen as a kind of illegitimate organism because it causes fear among its subjects, this is the closest Aristotle would get to formulating the idea state terror. Another motive for the killing of tyrants according to Aristotle is the hope to become famous; the Brutus murdered Julius Caesar perhaps the most famous act of tyrannicide ever committed³⁷.

The next group is Sicari, the Sicari were an ancient Jewish sect living in Judea controlled as a province of the ancient Roman Empire. Jews had lived under independent monarchy this is until the 1st century BC; in the first century AD, Jews longed to be free of foreign interference³⁸.

The Jewish inhabitants disliked Roman foreigners whose personal morals and habits were very different from those of their Jewish subjects, growing anger among Jews led to increasing violence in Judea. The first to be assassinated by Sicarii was Jonathan the high priest, after his death there were numerous daily murders. The Sicari then extended their efforts to the countryside where they attacked the estates and entered the city by night, this is Jerusalem, and kidnapped the Secretary of the temple Captain Eleazar, the son of the high priest and Ananias, and led him off in bonds. They then sent to Ananias saying that they would release the Secretary to him if he would induce Albinus, who was the Roman governor of the province, to release ten of their number who had been taken prisoner; Ananias under this constraint persuaded Albinus and obtained his request³⁹. So we have here is great pressure tactic the Sicari kidnap a prominent notable the son of the high priests and ransom him for ten of their own number. Kidnapping here for the Sicari was an integral part of their strategy and a tactic that proved to be effective.

The political motive was clear, the Sicari wished to rid the land of Romans clearly religion played a major role in motivating the Sicari also they followed distinctive set of Judaism called the forth philosophy⁴⁰ according to which the payment of taxes to the Romans made the Jews slaves to foreign overlords. According to the Sicari, God alone was their leader and the state was to be completely in the hands of the Jewish God and his representatives for the

³⁷ Laqueur, W. 2002. *A History of Terrorism*. New Brunswick, New Jersey: Transaction Publishers.

³⁸ Ibid.

³⁹ William, Whiston, 1973. *Antiquities of the Jews*, Containing the interval of 22 Years, From Fadus the procurator to Florus. The University of Cambridge. London.

⁴⁰ Marijn J. Vandenberghe, 2016. Villains Called Sicarii: A Commonplace for Rhetorical Vituperation in the Texts of Flavius Josephus, *Journal for the Study of Judaism* 47,p1-33.

accomplishment of God's purposes. In other words, the Sicari wished to create a Jewish theocracy, the rule of state by religious figures⁴¹.

The next period is the medieval period, in the case of the assassins. The assassin is the English form of the word "*Hashishiyya*" which is the root of the European word "assassin". The word "*Hashishiyya*" has something to do with the Arabic word of hashish, means men who smoked hashish or it could just mean be a word of unknown entomology. In any case, the assassins belong to the so called Nizari branch of the Ismaili sect of Shi'a Islam. There was a group located mainly in northern Syria and east into Persia, and their main focus of activity was from the 11th through the 13th centuries AD⁴².

After the Prophet Muhammad (*peace upon him*) died and his death led to the succession of the first Caliph, the Caliph is a word simply means the man who succeeds the Prophet. Abu Bakr's in this case who succeeded to the leadership of the Muslim community or the Ummah. A split soon developed in the Ummah many thought that the Prophet should have been succeeded by his cousin and son-in-law Ali Ibn Talib who is married to the daughter of Muhammad named Fatima, those who hold the belief that the caliphate that is the related political and religious government of Islam belongs to the family of the Prophet are called Shia Muslims. So this is the origin of the Shia -Sunni divide that you hear so during the Iraq war how this became prominent in American discourse. Shia Islam is Ismaili Islam, which takes its name from the belief that the imamate (leadership of the umma- the spiritual leadership) is to be traced through Ismaili the son of a cleric who followed the supporters of Ali Ibn Talib and his clerics name was Jafar al-Sadiq. The Ismailis emerged in the 9th century in many parts of the Muslim world as a secret revolutionary society; they were particularly active in northern Persia in a region called (Khurasan- modern Iran) in Yemen, North Africa and India⁴³.

In the 11th century the leader of a sect of Ismaili the Nazari sect in northern Iran was Hassan al- Sabbah. Hassan was trained in philosophy in the northern Iranian city of Ray which is just outside now northern Tehran the capital of Iran. He trained in Fatimid Egypt which was the first Ismaili government established in the Middle East. In 1090, Hassan Sabbah seized Alamut castle, a mountain fortress in northern Iran⁴⁴. Hassan preached a doctrine called

⁴¹ Ibid.

⁴² White, J. 1997. Terrorism: An Introduction. Belmont, CA: West/Wadsworth Publishing Company.

⁴³ Ibid.

⁴⁴ Ibid.

Dawa Jadida (new doctrine) which is what the assassins called themselves. He implemented various tactics that the assassins would employ until their suppression. These include constant hostilities with their Sunni neighbors and the Sunni for their part believed that the murder of Ismailis was a pious and desirable act. The assassins had a program of secret missionary activity and resistance to Sunni Islam by propaganda, rioting, and assassination. Their goals were it seems self-preservation and to the extension of Ismaili doctrine with the ultimate goal of founding the Ismaili state⁴⁵.

As stated above, a religious ideology and a political motivation behind the actions of the assassins. You can also see the reasons for this in some ways of their oppression at the hands of the Sunni majority. The methods of the assassins are what really made them famous and feared throughout the region. They practice of Fidai (one who offer up his life for another) can be seen in action by the willingness that assassins exhibited in their public actions and their willingness to be captured. One of their first victims was the seljuk sultanate of Iran Nizam al-Mulk. The Seljuk vizier Nizam al-Mluk was killed by an assassin this is their first highest profile killing and while assassination was not uncommon in the medieval world the methods of the assassins were both novel and terrifying⁴⁶.

In Syria the assassins were familiar to the Crusaders were launched in 1095. This is a European effort to recapture the Holy land from Islam and in the end a failed attempt for Europeans to colonize the Mediterranean including the holy city of Jerusalem. This led the Europeans to encounter assassins in various ways. The assassins medieval considered a terrorist. They did have a political motive and they conducted public killings to propagandize and so fear among their enemies and targeted audience. They were also so effective that their existence is covered in mystery and their legend lives on popular culture to this day⁴⁷.

2.2.2 Modern Terrorism (French Revolution, Colonial and Leftist Terrorism Era)

Modern terrorism begins as the 1890s and its associated with anarchism. That's mostly about extreme nationalist and political movements that are using terror to make a point anti-capitalist. One of the most significant appearances of terrorism after the WWII was the tendency of global violence and ferocity that took place in the year of mid-1960s where several features came together in order to facilitate and make more obvious international

⁴⁵ Ibid.

⁴⁶ Jenkins, B. 1992. Terrorism: A Contemporary Problem with Age-old Dilemmas. In L.Howard (Ed.), Terrorism: Roots, Impacts, Responses (pp. 13-28). New York: Praeger Publishers.

⁴⁷ Ibid.

terrorism. Smaller technical and scientific advances, creating weapons but using greater destructive power; the means for quicker movement along with communication that are offered to the terrorists; broad worldwide connections of the selected victims and the public relations generated any extremist attack⁴⁸. The origins of the guerrilla terrorist upsurge that eventually began in the 60s can be marked out to the battle in the central Middle East faces Arab countries against Israel nation. In the late 40s, several Jewish extremists and activist, for instance, the Stern, eventually used terrorism in contradiction of Arab communities along with other groups in their struggle for freedom from Israel. For the duration of and after the sixties, its Arab opponents decided towards using terrorism much more thoroughly⁴⁹.

The exclusion of Palestinian guerrillas as of Jordan in the year of September 1971 was remembered using the formation of a rebel called Black September terrorist support. The PLO, which was formed for Philistine Liberation, has carried out terrorism as well as commanded the global operations both in Israel and in a lot of other countries. Palestinian international terrorism base reduced during the 80s, in struggle PLO to win worldwide support to their cause, but then again there were new methods related towards the insurgency happened in Iran along with the rise of Islamic fundamentalism. In the incidence of terrorism further than the Middle East countries in the 60s was obvious in the three Nations that had advanced technology and the changes of dictatorship to democracy soon after WWII had been faster as well as traumatic which includes West Germany (which is now a part of the federal Republic of Germany), Japan and Spain. In some other Western states fundamental leftist groups, during the Cold War every so often funded by Communist governments also emerged. As terrorists ultimately tried to bring the failure of the state by means of violent along with self-destructive reappearance theories that inspired by unclear revolutionary and also sustained by leftist groups of different social sectors⁵⁰.

In old days of West Germany, the alleged Red Army Group, which was also known as the Baader-Meinhof gang, made many bank robberies and attacked US Army military installations. In the year of 1977, their most spectacular actions eventually took place through kidnapping and murder of most important industrial named as, Martin Schleyer along with the consequent kidnapping by Arab groups of a flight Lufthansa plane bound for the city of Mogadishu in Somalia. As one of the terrorist group that was led by Japanese Army, groups

⁴⁸ Carlos Marighella. 1971. Minimanual of the urban guerrilla, Survival, 13:3, 95-100, DOI.

⁴⁹ Jenkins, B.M., 1985. International terrorism: The other world war (No. RAND/R-3302-AF). Rand Corp Santa Monica CA.

⁵⁰ Kiras, J.D., 2007. Irregular warfare: Terrorism and insurgency. Understanding Modern Warfare, p.224.

of the German gang regularly cooperated with Palestinian terrorist group, along with special significance the killing of players of Israeli athletes at the Munich Olympics in the year of 1972⁵¹.

By the end of the 1970s, many activists of the Red Army Faction were eventually in jail or died. After the end of World War II, the terrorist campaign conducted by Irish Republican Army (IRA) emerged as of the Irish movement for the civil rights in the 60s, who ultimately demanded better conditions for Catholics in Northern Ireland. The increasingly terrorism that was used in cooperation with Catholics and Protestants led to the separation of the two communities in areas that were guarded by soldiers and militarization of state of Ireland. The Provisional Irish Republican Army-IRA conducted a series of blasts, assassinations along with other terrorist attacks inside as well as outside Ireland aimed against both military and civilian targets inspired by a revolutionary leftist thought and supported by Libya along with other supporters of leftist governments. On August 31, 1994, the campaign continued up until the Irish Republican Army-IRA declared a ceasefire⁵².

The power of the Italian guerrilla terrorists, of whom one of most vital were the Red Brigades, might have invented in the revolutionary or rebel tradition of the country along with its political uncertainty. In 1978 their activities ended along with the kidnapping as well as the murder of previous Prime Minister Aldo Moro. Leftist terrorism failed after many years, thanks to the measures taken by the police, but did not vanish at all. Though, left-wing or progressive terrorism in Italy appeared to increase, by way demonstrated in the year of 1980 with the blast at the railway station in Bologna (Italy). The notable Uffizi Gallery in Florence (Italy) was one of the main targets of a long series of terrorist attacks that took place in the year 1993, actually achieved by the Italian mafia. To promote a rigid authoritarian government courtesy a climate of instability and uncertainty a lot of these attacks are now measured exercises, "black propaganda" intended both the right as well as by other groups⁵³.

In Latin America Terrorist movements and activities had their roots in ancient civilisations of political fights located. As terrorist activities simply moved from the countryside landscape towards the cities, the main invention was the formation of the supposed urban guerrilla movements. Sendero, Peru Maoist terrorist group, in the end became one of the most

⁵¹ Weinberg, L., Pedahzur, A. and Hirsch-Hoefler, S., 2004. The challenges of conceptualizing terrorism. *Terrorism and Political Violence*, 16(4), pp.777-794.

⁵² Eager, P.W., 2016. *From freedom fighters to terrorists: women and political violence*. Routledge. p77.

⁵³ Schmid, A., 2004. Terrorism-the definitional problem. *Case W. Res. J. Int'l L.*, 36, p.375.

bloodiest and well-known for the use of tactics that were very bloody to weaken the state in addition to cause it by oppressive measures e.g. in the 90s ⁵⁴. However, among a prevailing trend in Italy through some specific traits by which crime that was organized imitates the terrorists to promote their interests, a number of members of the cocaine cartel in Colombia eventually used terrorist tactics in order to obstruct the implementation of laws and order heading for combating drug trafficking⁵⁵.

In the developing nations, the phenomenon that former legitimising terrorist group struggle and gained control of the government or specific areas in which to exercise power is given. Israel along with Algeria is just two examples of those states whose officials and leaders were once classified as terrorists. Governments that are born in such circumstances can preserve their ties to terrorism at once they are in power. It is a well-known fact that Libya and Iran both have revolutionary governments which have also supported acts of terrorism, with official character. North Vietnam ultimately supported a communist movement of terrorism and rebellion in South Vietnam for the duration of the Vietnam War. Some reporters have revealed that these terrorist attacks were led by Israeli Mossad agents⁵⁶.

Against South Korea, North Korea had launched some terrorist attacks, as the blast in Rangoon in the year 1983, in which 4 members of government and 13 South Koreans were killed, when the attacker destroyed plane of Korean Airlines in 1987, and it was initiated by the agents of North Korean⁵⁷. One of the best terrorist examples would be the attack that was suffered by the Star boat Greenpeace, the Rainbow Warrior in Auckland harbour in the year 1985, through the work of the French secret services. One of the most tragic examples of terrorism today in Europe constitutes the featuring in Spain by the armed group ETA (Euskadi Ta Askatasuna), which, with its continuous attacks, kidnappings, murders as well as coercion, has marked with the blood of the diplomatic Spanish consolidation process values democratic⁵⁸.

⁵⁴ Ganor, B., 2002. Defining terrorism: Is one man's terrorist another man's freedom fighter?. *Police Practice and Research*, 3(4), pp.302-304.

⁵⁵ Dumitriu, E., 2004. EU's Definition of Terrorism: The Council Framework Decision on Combating Terrorism, *The German LJ*, 5, p.585.

⁵⁶ Kilcullen, D., 2009. *The accidental guerrilla: Fighting small wars in the midst of a big one*. Oxford: Oxford University Press. Pp.133.

⁵⁷ Von Schorlemer, S., 2003. Human rights: Substantive and institutional implications of the war against terrorism. *European Journal of International Law*, 14(2), pp.265-282.

⁵⁸ Tse-Tung, M. and Mao, Z., 1961. *On guerrilla warfare*. University of Illinois Press.

2.2.3 Post-Modern Terrorism (Radical Religious Terrorism Era)

Today terrorism remains the largest security priority worldwide. The next front in the war on terror it's hard to say as there are so many groups in Southeast Asia, South Asia, Africa but less in South America now. However, the radicalism and extremist⁵⁹ have become a part of the landscape in almost every part of the world. The next front in the war on terror is difficult to predict. The question is the next front the war on terror war will be with Iran, it seems possible. There has been obviously rhetoric against the Iranian regime which is a militant Shia regime for years now over their pursuit of nuclear weapons which will continue to see in the news.

The most recently is the intervention of Iran in the Syrian civil war on behalf of the President of Syria Bashar al-Assad who is an Iranian ally and a needed client in that region. Syria provides the bridge whereby Iran can funnel its weapons and personnel to Hezbollah to pressure Israel and to wage a war against Israel. Therefore, without Syria on its western side, Iran feels vulnerable not only to being cut off from Hezbollah and also from pressure from its Sunni neighbor's form of the Saudi Arabia-led Gulf states.

Iran has attacked the United States through acts of terrorism on several occasions, the Beirut embassy attacked 1983, and most famously the attack on the Marine Barracks there in Beirut which had been one of the most, was at that time, costly terrorist attack in US history. Khobar towers bombing in Saudi Arabia in 1996 was also done by Hezbollah. Consequently Iran has at times lashed out at the United States for perceived aggression and will continue to do so. Most recently with the United States claiming to arm the Syrian rebel opposition, the Iranians have responded by declaring their intent to send Revolutionary Guards to Syria and this could lead to a really dangerous situation that could escalate into a shooting war between the United States or other powers in the region and Iran.

One of the main hotspot though of jihadi⁶⁰ terrorism in Africa is in Mali. There was a January 2013 French invasion with ongoing fallout and has been still rebel activity there. It's very complicated political landscape but basically there is an ethnic minority Tuareg Berbers who are fighting the government there and alongside them and often in opposition to them are these Sunni radicals that have infiltrated from across the border Libya and Algeria and

⁵⁹ Extremist is defined by scholars those are extremism whom committed acts which go far beyond the accepted norms of society values of the society but they're too much either to the left or to the right.

⁶⁰ Jihad is an Arabic term it means literally striving a struggle, struggle in striving to please God and do the God's commands.

elsewhere that are attempting to set up a an Islamic state in northern Mali. They have been French military intervention which was impossible to carry out without US support. They provided most of the logistical and technical support and the intelligence.

In Somalia of course al-shabaab group they have been pretty badly bloodied by efforts of the United States and its allies drone strikes and so on their camps and on the territories that they tried to control but they continue to wage their battle against the interim government of Somalia. Somalia remains a failed state with a very weak central government and it could the balance of power there could shift with an influx of new fighters and so on the side of al-shabaab. Al-shabaab includes a number of Americans including Omar Hammami (also known as Abu Mansur al-Amriki) who's from American from Alabama, it's been a attraction for American Somalis from northern United States .He have been recruited by radical mosques there in the Upper Midwest and sent abroad⁶¹.

In Kenya there has been a lot of overflow, there's organized crime that support this al-shabaab. There been attacks on tourists in Kenya as well as a vendetta attacks by al-shabaab against itself and against potential Klan rivals within the borders of Kenya numbering in the dozens now over the last couple years⁶².

In Nigerian Boko Haram sect in northern Nigerian Islamic part of the portion of Nigeria has been under intense pressure. It's been a very bloody extremely brutal campaign by the Nigerian government over the last couple of years that has cost the lives of thousands of civilians and Boko Haram supporters and foot soldiers on the part of the Nigerian government⁶³.

All of these conflicts are leading to the flight of people like Boko Haram members or Al Qaeda and Islamic extremists and its surrounding territory and it's infiltrating, in places like the Central African Republic and Chad are in places that they're very deprived and they have almost no militaries or central government. So these places now it is like a virus affecting these regions it becomes very difficult to quarantine these jihadi groups .They're very fluid and they're able to move over great distances undetected, so Africa remains at the forefront of the war on terror.

⁶¹ Robert D. Evans, 2001. American Bar Association Task Force on Terrorism; Law comments on pending House and senate Anti-terrorism legislation. Washington Office.

⁶² Chesney Robert, 2003. Civil Liberties and the Terrorism Prevention Paradigm: The Guilt By Association Critique. Michigan Law Review, Vol. 101, pp. 1409-1450.

⁶³ Ibid.

In Asia, India has numerous terrorist groups active within his borders. These are again the example of the largest Asian countries right now in terms of population India and China. India has the Naxalite Maoist insurgency; they've just assassinated some Indian government officials in central India in the rugged lands of the force and massif of Central India.

Lashkar-e-taiba is active in Kashmir as being known as Pakistani proxy. They're still active and conducting terrorist attacks in Kashmir and also in India itself. There's also a new a relatively new Islamist militant insurgency in the northeast of India called an (Assam). So India has really grave security challenges in terms of its internal stability from these terrorist groups and again why they do not represent an existential threat, India has in terms of per capita a much poorer country than a Western country. It has great challenges in terms of infrastructure, literacy, and education and would be better spent money arguably in humanitarian efforts and social and civic efforts rather than fighting terrorist groups⁶⁴.

In China, although very little gets out in the Western media, very little is known about the Turkic groups that are Islamic fighting the Chinese government in Xinjiang. The main group is the East Turkestan Liberation Organization (ETLO), there's a lot of disinformation coming out of China which of course itself is the world's largest oppressive state and western intelligence seems to cover on specific knowledge of the region. However, the roots of this movement are goes back to the Soviet invasion of Afghanistan. Also the Saudi Arabian money that spilled over Central Asia and funded groups like this and obviously provided the underpinnings of the Salafi Wahabi ideology that many of these groups now support. There's massive state torture in Asia and central Asia but they're also Islamic radical elements attempting to topple the government⁶⁵.

2.3 The nature of terrorism

Terrorism can therefore be expressed generally as a proscribed act counter to the values, expressed by most every human society and social group. So the question is who articulates and conducts terrorist acts. Terrorism obviously in this context then if you view take this assumption of proscribed acts as being immoral terrorism then becomes both illegal and immoral. The other question is there rules of terrorism and terrorists articulated strategy they carefully define the limits of their actions and they also express boundaries in the way they expect to be treated. This is very clear for example in the so called Global War on Terror

⁶⁴ Ibid.

⁶⁵ Ibid.

from the Islamist side where there are very strict rules of engagement set out by terrorists regarding their selection target what's a legitimate target and so on. There are obviously problems of perspective which again raise guerrilla fighters in the Afghan war the Soviets in the 1980s, the so-called Mujahideen, they were called freedom fighters in the United States but they committed acts defined by the international community as war crimes or terrorism⁶⁶.

2.4 Conceptual and Legal difficulties in defining Terrorism

This section will be discussing a few of the challenges and legal difficulties behind defining the term terrorism. It will also look at the various definitions proposed by the United Nations, Governmental Organizations, as well as scholars in the field. It's often been said that *"one man's terrorist is another man's freedom fighter"*⁶⁷. This describes the problem of defining what terrorism truly is. Academics, politicians, security experts, the armed forces, and journalists all use a variety of definitions of terrorism. Some definitions focus on the terrorist organizations mode of operation, others emphasize motivation and yet others focus on the characteristics of the person who is perpetrating the terrorist act⁶⁸.

The word itself comes from the Latin word to frighten as explained above; following the late 19th and early 20th centuries, it will find that many anarchists and revolutionary groups embrace the term terrorism; however, since World War II it's carried a much more negative connotation. The prevalent definitions of terrorism are telling many difficulties, from both a conceptual and a literal perspective. It is not surprising that often hear a group described with more positive connotation and depending on who is describing the group. For instance, you may hear it terrorist organization called a guerrilla fighting organization or a resistance front or a National Liberation Movement. Likewise you may hear these same groups called terrorists but at what point is a group a terrorist organization, at what point is a person a terrorist, how do you know when you're faced with terrorist activity or a civil disorder or a rebel group or an act of war⁶⁹.

Throughout the years, there have been many organized groups that assassinate high-level politicians and military members. This is typically what was thought of as terrorism prior to

⁶⁶ Hafner, G. 2006. The Definition of the Crime of Terrorism. In G. Nesi (Ed.), International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism (pp. 33-44).

⁶⁷ Ganor, Boaz. 2002, Defining terrorism: Is one man's terrorist another man's freedom fighter? Police Practice and Research 3, no. 4 : 287-304.

⁶⁸ Rex A. Hudson, 1999. The Sociology and Psychology of Terrorism, who becomes a terrorist and why? A Report Prepared under an Interagency Agreement by the Federal Research Division, Library of Congress.

⁶⁹ Ibid.

the 20th century. During the Revolutionary period in France there was actually a period of violence so deadly that thousands of innocent civilians were condemned to death. This reign of terror was actually a policy by the government against the people. The 21st century definition has completely reversed; today it's typically viewed as an action against the standing government not in action by a government. There is no general consensus as to how to define terrorism, this is partially because the term is politically loaded. For instance, a group may be labeled a resistance organization or a separatist movement at one point in time but as the political situation changes they can be labeled a terrorist organization. Likewise, the same group may be labeled a terrorist organization by one country but a resistance movement by another; similarly legitimate organizations may use the same tactics as terrorist organizations.

To begin, we discuss some of the scholarly definitions of terrorism. Now many scholars have offered definitions of this word. These definitions come from some of the most prominent scholar in the terrorism field. Alex Schmid was one of the first scholars to offer a definition of the term terrorism, when he said that “terrorism is the peacetime equivalent of a war crime”⁷⁰. In 2004, Bruce Hoffman one of the world's leading experts in terrorism has given a more nuanced definition of the term, he described it as politically named violent and conducted by organizations with an identifiable chain of command or a cell structure he said it was perpetrated by a sub-national group or non-state entity⁷¹. Lastly the famous Israeli scholar Boaz Ganor offers a very simple definition of the term when he says “terrorism is the deliberate use of violence aimed against civilians to achieve political ends”⁷².

Many terrorist acts cross international boundaries, so the UN definition is important to study. UN Security Council Resolution 1566 (2004) defined terrorism as “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act”. As you can see here in the UN's definition use of the word criminal in this definition, this is an important distinction

⁷⁰ Schmid, A., 2004. Terrorism—The Definitional Problem. *Case Western Reserve Journal of International Law*, p36.

⁷¹ Hoffman, B., 2006. *Inside Terrorism*. New York: Columbia University Press.

⁷² Boaz Ganor., 2002. Defining Terrorism: Is One Man's Terrorist another Man's Freedom Fighter?, *Police Practice and Research*, 3:4, p287-304.

later we will see how another organization directly contradicts this element of the UN's definition.

The next two definitions come from two very important governmental organizations in the United States both of which have a role in countering terrorist activity. The first comes from the US Department of Defense which define terrorism as “ *the calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological*”⁷³.

The next definition comes from the US State Department which has the challenging role of protecting US embassies overseas and promoting the policies of the United States abroad. It defines terrorism as "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives"⁷⁴.

Two other US government agencies that are directly involved with countering terrorist activity are the FBI and the CIA notice how their definitions of terrorism are slightly different from those of the Department of Defence and the State Department. First, let's look at the FBI's definition; it defines terrorism as "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives". As we notice how the FBI definition includes violence against property. Now let's look at the CIA's definition, the term "terrorism means premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents". As we notice here that the CIA says terrorism is not criminal, whereas the UN defines terrorism as a criminal act. Some of the elements of terrorism in the previous definitions were located in more than one definition and some of them actually contradict each other. For instance; the UN defines terrorism as criminal activity whereas the CIA defines it as non criminal. The DoD definition is the only one that includes the element of instills fear. The DoD and the FBI both see terrorism as unlawful, the CIA and the State Department both agree that terrorism is premeditated targets non-combatants and it's sub-national in nature. The State Department,

⁷³ Ibid.

⁷⁴ Ibid.

FBI, CIA and DoD as well as scholars Hoffman and Ganor all agree that the motive is typically political or ideological.

If we look at some of the most violent activity that has taken place worldwide over the past to see if each of these matches the elements listed by the various organizations definitions. For instance, when the Free Syrian Army fights the regime of Bashar al-Assad in Syria, are they considered to be terrorists? From many Western journalists the answer is no because the FSA is targeting enemy combatants. However, the question is about the Al-Nusra Front when Fights Assad's regime is they also a terrorist organization? This it depends, sometimes groups may take actions that are really acts of war, but at some point in time they were involved in terrorist activity so they're considered a terrorist organization. In this case the Al-Nusra Front may be involved in a civil war on the one hand but they're considered a terrorist organization because of the other activities they've been involved with.

Now if we look at mass shootings , think back to the Fort Hood shooting of 2009⁷⁵ when Major Nidal Hasan fatally shot 13 people and injured 30 others at a military base in Texas . The Fort Hood massacre instilled here it was unlawful and it was premeditated. The FBI later uncovered emails between Nidal Hasan and a Yemeni cleric named Anwar al-awlaki showing that this was a politically motivated attack. There is some question as to whether or not Major Hassan's targets could be considered non-combatants? He targeted military personnel but those personnel were not openly engaged in combat during the time of the attack. How is the Fort Hood massacre different than when Adam Lanza fatally shot 20 children at Sandy Hook Elementary School in Newtown Connecticut⁷⁶. Adam Lanza instills fear, he conducted a premeditated attack on non-combatants, and it was a surprise but was unsure what his motives were. This is the key difference unlike Major Hasan we do not believe that Adam Lanza's motives for political in nature.

From the above definitions, another question arises of what is a civilian and does this mean the terrorism cannot occur against the military personnel. We can say that civilians are non-combatants, non-uniformed unarmed people perhaps as a person working in a government bomb factory that a civilian? By some accounts yes but within the view of some no, especially this is one of the legal excuse that the Usama bin Laden used and justifying his

⁷⁵ Nick Allen , Andy Bloxham , 2009. Fort Hood shooting: 13 killed and 30 injured at US Army base, The Telegraph news room.

⁷⁶Dave Collins, 2017, Sandy Hook shooting: FBI files reveal mass killer Adam Lanza had paedophilic interest in children, Bureau releases 1,500 pages of new documents on murderer who killed 20 children and six teachers in attack on primary school in December 2012, Independent news room.

attacks against Americans of any stripe there were no civilians according to him. Bin Laden declared that America being a democracy had its citizens shape its government and citizens were therefore responsible for the actions of its government. Therefore every one of its citizens was morally culpable for the actions of the US state. Ultimately this guilt from bin Laden's perspective made it right and legal to kill any American regardless of age, sex or official status because they were morally guilty for the accidents democratically elected government. This is an inversion of the idea of limited moral culpability and one of the ways in which bin Laden altered the face of Islamist terrorism. In another way, so in bin Laden's view there are no civilians because perhaps you or your parents voted for George Bush and George Bush conducted war against Islam for example, and you share in Bush's actions and you are morally culpable for the actions of say the Iraq war. This is a great legal leap for Bin Laden to make it was revolutionary in the way Islamists approached their perception of the United States and conduct of terrorist operations.

In contrast, the US efforts for example to label some groups in the civil war in Syria as terrorists while asserting that others conducting the same kinds of operations in the same war at the same time are not terrorists⁷⁷. Also the example of the Irish Republican Army particularly during the early 20th century when southern Ireland broke through British rule, were these terrorists or guerrilla revolutionaries fighting against the colonial power⁷⁸.

The above brief overview has intended to offer a few attempts at defining what we call terrorism. This concludes that there is no one definition able to accommodate all situations due to problems of perspective evident and situational use of definitions almost very important.

2.5 Characteristics of International Terrorism

Terrorism cannot be simply defined as one of the violent crimes that happen in everyday life but it is now classified as the fourth generation warfare. It is defined as the use of violent force in order to achieve specific goals and aims that might be religious, political or ideological aims. Terrorism can be considered as the major threat towards the whole country in case of an international terrorism it is a war crime so there are many antiterrorism laws that are created in order to combat terrorism. To the overall population, indiscriminating violence

⁷⁷ Crook, John R. 2013. President Obama outlines shifts in U.S. counter-terrorism policy', American Journal of International Law 107: 674-679.

⁷⁸ Hopkinson, Michael, 2002. The Irish War of Independence, Montreal, McGill-Queen's University Press.

spreads its effects. His irregularity means conduct astonishment is pervading terror. Immorality causes unnecessary suffering: hit the most vulnerable areas. It is unintended: distract the judgment eyes of the populace to a certain point, which is not the target that was planned. Terrorism itself that marks and targets civilians have grown the participation of military, ex - military, along with members of different intelligence services. A number of reasons are inspired by the terrorists. Student's terrorism eventually classifies them into three groups: rational, mental, and cultural. A terrorist might be created by combinations thereof⁷⁹. To reach their target and real terrorism, they try to determine if there are less exclusive as well as more operation always. To (or "intending to") assessing the risk and danger, he weighs the defensive abilities of the target in contradiction of their capacities and skills to (or "intending to") attack. With an aim of sustaining the struggle and determination, with the measures and abilities of some group one of the important question is whether terrorism completely works, with given social conditions and situations at the time. Rational analysis and study of the terrorist are likewise of a military chief or a business tycoon who contemplates available lines of conduct⁸⁰.

Current history provides certain examples of some groups that have decent projection towards success apparently paid the value for the response towards terrorism. In the late 70s, the Tupamaros in the country of Uruguay and the ERP (People's Revolutionary Army) and Montoneros in Argentina motivated aggressive popular reaction towards terrorism. They pushed civilisations beyond their beginning of tolerance and therefore were demolished. The same scenario applies to several groups that were working in Turkey dated in the late 1970s and perhaps a number of families of person named as Mafiosi in Italy in the era of '90s⁸¹.

2.6 The Importance of Defining Terrorism

As mentioned above, by describing the word terrorism is not just a theoretic matter of the subject but a functioning concern of the first order. As per today world, terrorism is no longer a specific country problem but then again an issue comprising some global aspects. In a broad range of countries terrorist organizations might commit attacks; those who are victims of these attacks are from diverse nationalities; the workplaces, headquarters, and training sites of terrorist organizations and governments function in a number of countries. Terrorist

⁷⁹ Jenkins, B.M., 1985. International terrorism: The other world war (No. RAND/R-3302-AF). Rand Corp Santa Monica CA.

⁸⁰ Kiras, J.D., 2007. Irregular warfare: Terrorism and Insurgency, Understanding Modern Warfare, p 224.

⁸¹ Weinberg, L., Pedahzur, A. and Hirsch-Hoefler, S., 2004. The challenges of conceptualizing terrorism. Terrorism and Political Violence, 16(4), pp.777-794.

organizations accept direct as well as indirect assistance as of different states, recruit support as of a number of different ethnic and cultural communities, along with secure financial and monetary help from all over the world. Responses related to terrorism should also be on a global scale since terrorism and violence is an international phenomenon⁸².

Through developing an operational and efficient international strategy it needs agreement or contract on what it is we are eventually dealing with, in additional words; international community want a description and explanation of terrorism. Recruitment of International groups against terrorism, for instance, which initiated in the mid of 90s and ended in the international agreements in the Group-7 countries in Sharm el-Sheikh Conference, ultimately can't lead towards effective operational results given that the members cannot agree on a single definition⁸³. Not a single duty and responsibility can be enforced on those nations supporting the act of terrorism, nor any can step be taken to combat terrorist related organisations as well as their allies deprived of answering the query of 'what is terrorism,'. It is nearly not possible to formulate or impose international contracts and contracts against terrorism deprived of a definition of terrorism. A visible instance of the need to (or "intending to") defining terrorism worries the repatriation of terrorists. Even though many nations have signed two-sided, and mutual agreements and contracts regarding a vast range of crimes, expulsion for political wrongdoings are often clearly excluded, along with the detailed background of terrorism which is always politically related. To deport individuals who are wanted for terrorist activities this gap allows countries to avoid their obligation⁸⁴.

2.7 Understanding the causes of Terrorism

This section will address and explain the causes of terrorism. Academic, scholars and policymakers have attempted to answer this for many years. Even if we agree on the definition of terrorism but they certainly won't agree as to why anybody would want to blow up say worshipers at a mosque or commuters who are headed home on a bus or people eating at a restaurant or in a bar, why would they behead journalists or humanitarian workers on camera. These questions seem extraordinary and very hard to explain but we know that many

⁸² Bassiouni, M.C., 2002. Legal control of international terrorism: A policy-oriented assessment. Harv. Int'l LJ, 43, p.83.

⁸³ Dumitriu, E., 2004. EU's Definition of Terrorism: The Council Framework Decision on Combating Terrorism, The. German LJ, 5, p.585.

⁸⁴ Harnisch, S., Frank, C. and Maull, H.W. eds., 2011. Role theory in international relations. Taylor & Francis.

people from a variety of backgrounds, different ideologies, and different religious faiths have engaged in these actions and engaged in them systematically⁸⁵.

The answer that those who use terrorism would give that they had no other choice; they're implying that terrorism is the weapon of the weak and those who lack power⁸⁶. If terrorists had aircraft they say they would bomb from the air they don't, so they use individuals who volunteer them to blow themselves up. However, this really isn't a sufficient explanation even if it's true and it's not always true, it's not always the case that the users of terrorism are weaker than their opponents. In fact recent groups such as radical Islamists, whom sometimes call jihadists, require violence as a religious duty. They regard terrorism what we would regard as terrorism as an imperative even if they had other means. They think it's something that is both justified necessary indeed an obligation, so how do we go about analyzing the issue of causation. One of the first approaches that analysts adopted to causation was to look at what we would call macro level conditions, this would be society, economy, political regime and we would say are these the causes of terrorism and is it the environment in which terrorism occurs. Over decades efforts have been made to link terrorism to for example poverty, inequality, injustice, democracy or perhaps the lack of democracy, apocalyptic ideologies, the presence of American troops or American multinational corporations ,Western cultural influences, globalization any number of conditions⁸⁷.

The difficulty is that very few people resort to terrorism, the numbers are very small but the majority numbers of people live under these conditions are affected by them in one way or another. The question is how we explain the behaviour of a few people in terms of what affects the many, why doesn't everybody resort to violence under these conditions and clearly they don't. Therefore, underlying conditions considered in the aggregate are not sufficient as an explanation but it's not at all clear that they are even necessary to an explanation. For example in the 1960's and 1970's which is when the era of international terrorism began. Those groups that used terrorism on the revolutionary left were very often the children of privilege middle class, upper class and those would be revolutionaries in Western Europe, US, Canada lived in functioning democracies. They could vote, they could protest and in fact terrorism was often the consequence of protest movements. It was seemed to be sort of a last

⁸⁵ Crenshaw, Martha. 1995. *Terrorism in Context*. University Park: Pennsylvania State University Press.

⁸⁶ Crenshaw, Martha. 1981. *The Causes of Terrorism*, *Comparative Politics*, Vol. 13, No. 4 , pp. 379-399.

⁸⁷ *Ibid*.

resort of hardliners within a protest movement who weren't happy with the compromises that other protesters had made with the government⁸⁸.

Sometimes in the 70s, terrorism was the work of separatists like the Irish Republican Army who were doomed to be a permanent minority in a majority system but still overwhelming majority of even people who favoured separatism rejected violence and rejected terrorism. This sort of challenge led analysts to consider the other end of the spectrum of causation, perhaps we need to look at the level of the individual. This means we need to look at psychology, social psychology and demographic factors that might cause an individual to take the path of terrorism. There's currently a lot of interest in processes of radicalization, it falls in this category of inquiry of asking about individual motivation. The question is how some individuals come to favour the use of violence in the service, in this case Islam, and can individuals be converted to very radical views through exposure to the Internet. What encourages young Muslims or converts to Islam to go abroad to fight possibly to return home to commit acts of terrorism. Here we say did they experience discrimination, frustration, some analysts have pointed to a death wish, a sense of romantic adventurism, family difficulties and some are pointed to the case of suicidal tendencies in the case of what we usually call suicide terrorism and those who use it are more likely to call martyrdom operations. It is difficult to answers to these questions in part because they're not very many subjects were available to interview and analyse and it's also very difficult to compare the uses of terrorism to similar people in the same cohort who rejected terrorism. One thing that we can say pretty decisively is that there's no psychopathology behind the resort to terrorism, and there's usually nothing very noticeable in the behaviour or attitudes that would make potential recruits stand out among their peers. There's certainly no profile of the terrorists although governments over many years have certainly sought to find one and invested resources in finding one. Looking at the group in general individuals who engage in terrorism are not so-called lone wolves despite the fact that there's a lot of interest in lone wolves these days. They are actually members of a group of people who think alike they join a group of like-minded individuals and often they're recruited through groups not as

⁸⁸ Crenshaw, M. 1995. Thoughts on Relating Terrorism to historical Contexts. In M.Crenshaw (Ed.), *Terrorism in Context* (pp. 3-24). University Park, PA: The Pennsylvania State University Press.

individuals. This is the case no matter what the ideology it can be the far right, the far left, Islamist and separatists does not matter⁸⁹.

There are two implications here for why terrorism would happen; one is that recruits into terrorism members of these organizations develop a common identity. This sense of cohesiveness and cohesion makes conformity and compliance with group norms extremely important makes it extremely difficult for people to break away from the group. We have seen this in many different circumstances over many years; they are subject to a fairly extreme peer pressure they exist under conditions of secrecy and danger. Sometimes they are part of a fighting core all this creates bonds that are extremely powerful both among the members of the group and between the followers and their leaders. Accordingly this is called by some people studying terrorism to say that the real cause is not the ideological ambition to establish, for example in Islamic State or in previous cases an independent state. This may not be the real cause of individual behaviour in the sense of what's driving terrorism. In fact students of military history know quite well the soldiers fight and die in battle for their buddies not for an abstraction.

The other implication for causation is that we really need to take the strategies and the cultures of militant organizations quite seriously. We can't assume that the resort to terrorism is a sign of individual irrationality or unreason or fanaticism or some sort of automatic reaction. This would be arguing terrorism is usually calculating it can be a miscalculation but as a result of strategic thought. What this means is that, we need to be careful to take note of what extremist groups say, their communications rather than dismissing what they say as simple propaganda. They may be trying to influence an audience through what they say but it's still an insight into how they think⁹⁰.

The terrorists of the 21st century have become extremely clever at communicating their message via the Internet. In the case of radical Islamists such as ISIS or Al-Qaeda, we often think of their ideas as outdated and traditional but if they are and that's of course our view of what they are, they're accompanied by excellent communication and technical skills, particularly in the video domain. In conclusion, for a long time Western observers dismiss the

⁸⁹ Ibid.

⁹⁰ Combs, C. C. 2006. *Terrorism in the 21st Century* (4th ed.). New York: Prentice Hall.

idea of establishing a Caliphate in the heart of the Middle East as completely impracticable only to see ISIS establishing control over sizable amount of Syria and Iraq⁹¹.

2.8 Terrorism and other interchangeably used concepts: a comparative analysis

It is been believed by most of the researchers and globally recognized explanation of terrorism can in the end never be established upon; so they say, 'terrorist of one group is freedom fighter of another group.' The question arises that who can be called as a terrorist, as stated by this philosophy, it depends totally on the personal viewpoint of the definer. In this chapter it is argued that a neutral description of terrorism is totally not possible; to combat terrorism, it is similarly essential to any attempt that is serious. Concerning what behaviours are allowed in wars that are conventional among nations are inaccurate along with an objective description of terrorism can be built upon recognized global laws as well as principles⁹². To struggle among a non-governmental organisation along with a state, this normative code and belief of concerning to a formal state of war, among two nations can be stretched deprived of any difficulty. This comprehensive form would eventually distinguish among guerrilla warfare as well as terrorism. The main aims and objectives which led down guerrilla warfare and terrorism might be same, but if their targets are concerned, they might differentiate from each other⁹³. Fighters of guerrilla fighters are against military while on the other hand terrorist targets are civilians. According to this explanation, a terrorist organisation or group can totally no longer be called as a freedom fighter because they are fighting for the liberation movement. If an organisation kills civilians even if they called them as freedom fighters they will still are put as a terrorist⁹⁴.

2.8.1 Freedom Fighting and Terrorism

Normally terrorist organisations define themselves as freedom fighters, fighters in contradiction of social, cultural, financial, religious, or imperialist repression, or any grouping of these. If we consider the separate side of the barrier, it is a clear attempt to damage terrorism; officials have offered the terms 'terrorists' along liberty or 'freedom fighters' as inconsistent. Thus, it has been stated by the ex-president of America: 'The main difference

⁹¹ Ibid.

⁹² Guillaume, G., 2004. Terrorism and international law. *International and Comparative Law Quarterly*, 53(03), pp.537-538.

⁹³ Carberry, J.A., 1999. Terrorism: A global phenomenon mandating a unified international response. *Indiana Journal of Global Legal Studies*, pp.718-719.

⁹⁴ Paust, J.L., Scharf, M.P., Sadat, L., Bassiouni, M.C., Gurulé, J., Zagaris, B. and Williams, S.A., 2000. *International criminal law* (pp. 857-62). Durham NC: Carolina Academic Press.

between terrorists as well as freedom fighters is from time to time clouded. It is said by some men that “One man’s terrorist is another men freedom fighter”. The logical and ethical differences are plain as well as fundamental. Deprived of passing the decision on the self-report of any of specific group, trying towards presenting the terms 'terrorists' as well as 'freedom fighters' as commonly special on the whole is a logical misconception ⁹⁵. Two different features of human behaviour are terms which describe 'Terrorism' as well as 'freedom fighting'. The first symbolises a process of struggle along with the second cause. The overall causes of set of groups which accepted terrorism by way of a mode and method of struggle are as varied as the interests along with goals of humanity. In the spirit of the right wing along with left wing philosophies and beliefs among the declared cases of groups of terrorist are changes that are social, goals and objectives that are associated along with religious beliefs, ethnic complaints, and environment related issues, rights of the animal in addition to specific subjects for example abortion. A few of terrorist groups certainly fight for freedom or national liberation. In contrast, towards terrorism to advance their cause, not all national freedom movements resort. In other words, some are one or the other and some are neither some insurgent group are together terrorist along with freedom fighters⁹⁶.

Terrorism/ insurgencies have been employed as a tool for dramatic change in society, in an attempt to overthrow the concession capitulation/ oppressive regime. Due to the effectiveness of their endeavours, it is imperative to comprehend grounds for insurgencies, understanding the terrorist connection and usage of guerrilla warfare to obtain desired results. Violence and bloodshed have used a method for political discourse, the insurgent/ terrorist groups have employed guerrilla warfare/ mass terrorism to leverage their political demands, dictating the process on their terms. The means of international discourse changed due to the inception of terrorism and insurgent groups⁹⁷.

The grounds for terrorist/ insurgent groups can be myriad, ranging from cultural/ ethnic marginalisation, inept political bureaucracy, economic disparity, mismanagement of resources ultimately led leaders such as Che Guevara and Mao Tse-tung to invoke idealistic strategies against an oppressive government. The Marxist ideology was employed which invoked uprising by proletariat class against the elite classes thereof. As a result, the successful attempts of these two leaders advertently led to using self-centred methods to

⁹⁵ Laqueur, W., 1976. Guerrilla warfare: a historical and critical study. Transaction Publishers.

⁹⁶ Danieli, Y., 2005. Reappraising the Nuremberg trials and their legacy: The role of victims in international law. Cardozo L. Rev., 27, p.1633.

⁹⁷ Ibid.

further their personalised agenda. More so, their demand and popularity advertently increased due to their dealing with local demands of the populace at large, as well as promising rights to nation rejected by host government⁹⁸.

Whereas violence is a predominant phenomenon over the time-period, terrorism and insurgency activities has increased, the terrorist groups/ insurgent groups are inept of creating a government, whereas they are apt for organising an overthrow of the host government, they advertently lack leadership skills to deal with the population as a whole. With Roman control over the controlled territories, to Taliban controlling regions of Afghanistan, notwithstanding the current opposition by groups in Iraq, the common denominator amongst these case-points is increased violence, casualties, lack of leadership and centred government. Insurgent/ terrorist activities have been commonplace throughout human history, inclusive of governmental control of the nation (attempted/ achieved)⁹⁹. In 1648, with the Treaty of Westphalia, the political profitability and actual propensity of terrorism/ insurgency increased all the more, allowing repressed subjects/ groups to organise a platform for leveraging their demands forcefully. Violence has been a final element in their tactics to politicise the agenda for attaining their aim. However, the agenda is still similar; the modern version has modified to a certain extent, particularly in the case of Taliban tribes present in Afghanistan in addition to dissenting groups in Pakistan, waging war on national fronts against national forces. The ultimate aim of terrorism is to attain desired demands of a minority group via means of violence and bloodshed. As is the case, major post-colonial insurgencies have posted the self-determination right which includes freedom from imperial power, particularly from so-called puppet regimes (regimes instituted by the colonial powers to affirm a certain amount of control) over colonial leftovers. The creation of Jewish homeland in Israel, present Islamic countries, post-colonial India, African, Asiatic and Latin countries fall into this category since insurgent repercussions were based on religious/ political grounds¹⁰⁰.

During the 18th century, the sudden spike in violence created small forces tasked with combating, which was termed as a guerilla force. With the increasing lethal nest of their weapons, using the tactics of guerilla fighter warfare, guerilla fighters exploited the weakness of opposition forces by harassing them. Whereas guerilla warfare is detected as a form of warfare, rather a kind of criminal behaviour, the effectiveness of guerrilla warfare became

⁹⁸ Duffy, Helen ,2009. The 'War on Terror' and the Framework of International Law. Cambridge: Cambridge University Press.

⁹⁹ Goldstone, R , 2005. Combating Terrorism: Zero Tolerance for Torture. Case W. Res. J. Int'l L., 37, p.343.

¹⁰⁰ Ibid.

apparent as it brought favourable results, turning tides in normative battles. The guerilla forces operate in a slightly different manner as in the case of Native American warriors; they are scattered as opposed to working in the group against enemy firepower. Moreover, they attack using man-to-man marking, since they vanish when enemy fire increases, resuming attack when enemy fire decreases¹⁰¹. The guerrilla warriors dissipate quickly, adapted to terrain, quicker to attack when the opportunity arises, loot and plunder the enemy forces and disrupt the enemy supplies when possible. This strategy was entirely possible against British military. The Chinese forces took on the British armed troops in a terrain suiting them, with no military training nor funding, which was employed by Spanish against Napoleonic forces. The guerrilla troops were not sanctioned/ owned by the government, were funded by local communities, using weapons from opposition forces; as a result, they were self-sufficient army relying on chance and skill largely. As the tactical success of guerrilla warfare increase, it became a de-facto method of instilling political change, bringing revolution against an oppressive regime. Che Guevara and Mao Tse-tung popularised guerrilla warfare tactics. Advanced militaries were tackled by using guerrilla warfare tactics which were relatively unknown to advanced military forces, and forces were ill-prepared to address the evasiveness of guerrilla war¹⁰².

As per Mao, he stated that in the case of retreat process, two conditions must be met before determining the situation being favourable to them, undesirable for the enemy combatants and initiating the counter-attack.

These conditions are as following:

- The populace supports actively the Red Army
- Terrain is totally favourable for such guerrilla actions
- The forces of Red Military forces are focused
- The weak spots of the enemy have been identified
- The opposition is reduced to a non-combative state, in a condition of demoralisation
- The opposition is now more prone to make errors

Such conditions are necessary for furthering guerrilla operations. Whereas Mao in actuality concentrated his movement on uplifting the Chinese nation, his demands and guerrilla

¹⁰¹ Cohen, A., 2011. Prosecuting terrorists at the International Criminal Court: re-evaluating an unused legal tool to combat terrorism. Mich. St. U. Coll. L. Int'l L. Rev., 20, p.219.

¹⁰² Ibid.

warfare tactics eventually struck a chord with major movements against regimes which were deemed as repressive/ totalitarian in nature. There is a low correlation between Che Guevara and Mao for demanding rights using guerrilla warfare. Che Guevara asserted the thought-process of Mao as he posited that fighter needs a sound knowledge of countryside, as well as the escape and entry paths, hiding places, quick manoeuvres and in last, the support of populace¹⁰³.

2.8.2 Guerrilla Warfare and Terrorism

Guerrilla warfare is completely not a different phenomenon in addition to that history is an observer to its constant occurrence. In this era, for the duration of the Napoleonic Wars, it developed importance which directed to an analysis of its role in leading 19th-century thinkers together with Clausewitz, Marx and Engels. The concept along with the practice of guerrilla warfare was incorporated inside social, economic as well as political programmers over the development of the following century that expected to overthrow recognised authority along with altering society through an armed fight. By Italian along with the Polish rebels the link that was fictitious in the mid-19th century like Carlo Blanco along with Mazzini accomplished execution in the writings and repetition in the 20th century¹⁰⁴.

Regarding the same phenomenon terrorism along with guerrilla fighting often serves as different designations. So the term ‘terrorism,’ though, has an extreme and more negative implication, apparently needing one in order to take a stand, while the term that is ‘guerrilla warfare’ is supposed as unbiased along with carries a more useful meaning. One of the difficulties that is associated with the use of the idea ‘guerrilla warfare’ stalks as of its uncertainty. According to some researcher it is defined as ‘guerrilla war’ by way of a protracted war of abrasion, along with gradually increasing violence, unclear restrictions, a melted line of interaction, give emphasis to the human factor. On the road to guerrilla war, guerrilla fighter eventually becomes regular fighters until and unless victory is achieved and one of the parties is beaten¹⁰⁵. Likewise, some other researchers argued that “guerrilla fight be a particular type of fighting by which the side which is strategically weaker adopts the strategic aggressiveness in selected forms, times period and places. Weak people use a weapon of guerrilla frightening. In guerrilla war the impact of terrorism is always raised, in

¹⁰³ Ibid.

¹⁰⁴ Much, C., 2006. International Criminal Court (ICC) and Terrorism as an International Crime, *The. Mich. St. J. Int'l L.*, 14, p.121.

¹⁰⁵ Slaughter, A.M. and Burke-White, W., 2006. Future of International Law Is Domestic (or, the European Way of Law), *The. Harv. Int'l LJ*, 47, p.327.

addition to that it also indicates that “activity of guerrilla warfare is best placed in order, ranging from irregular and periodic terrorist attacks not essentially against armed units, along with military forces up to continuous guerrilla war and conflict”¹⁰⁶. Some of the other views of guerrilla war as well as terrorism as two distinct points along one order dealing using the use of strength and violence and ferocity¹⁰⁷.

2.8.2.1 Goals of Terrorism along with Guerrilla Warfare

In view to define the term terrorism the kind of aim, goal, and objective required is irrelevant (as long as the objective is radical). The aims and targets of terrorist and guerrillas might be same, but then again they eventually choose different means in order to achieve them. Between the political goals and objectives that unlike organizations (in cooperation with terrorist organizations as well as guerrilla movements) find to accomplish it might declare: movements of national liberty (liberating regions of a conquering power); rebellion (overthrown of government); disorder (forming disorders and turmoil); altering the dominant system which is socio-economic, etc¹⁰⁸. By way of opposing to creating the classification on the objectives and goals of violence simply by describing terrorism by means of a method of operation that has been directed in contradiction of civilian targets, the slogan has been refused that ‘terrorist of one man’s is freedom fighter of another man’s. By replicating the personal perspective of the writer this difference among the target of the violence and attack along with its aims eventually shows that the difference between ‘terrorism’ along with ‘freedom fighting’ is totally not a personal difference¹⁰⁹. Relatively a significant difference is caused, among the criminals’ by involving a clear and vibrant division aims along with their mode of process and operation. As described, since its mode of process and procedure an organisation and group are defined as ‘terrorist’ along with its target of the attack, while calling somewhat a ‘fight for liberation’ has on the way to do using the aim and objectives that the organisation eventually seeks to achieve¹¹⁰.

¹⁰⁶ O’Connell, M.E., 2001. Lawful self-defense to terrorism. U. Pitt. L. Rev., 63, p.889.

¹⁰⁷ Werle, G. and Jessberger, F., 2014. Principles of international criminal law. OUP Oxford pp.43-44.

¹⁰⁸ Danieli, Y., 2005. Reappraising the Nuremberg trials and their legacy: The role of victims in international law. Cardozo L. Rev., 27, p.1633.

¹⁰⁹ Travaglio, G.M., 2000. Terrorism, international law, and the use of military force. Wis. Int’l LJ, 18, p.145.

¹¹⁰ Reisman, W.M., 1999. International legal responses to terrorism. Hous. J. int’l L., 22, p.3.

2.8.2.2 The Involvement of States in Terrorism and Guerrilla Warfare

How will the participation of nations effect in the execution of the terrorist attacks on the foundation of terrorism with guerrilla warfare? It should be noted that vicious actions committed through a state in contrast to civilians are prohibited and banned by international agreements in addition to that they are clearly defined as ‘war crimes’ (in the background of a war state) and also as the ‘crimes against humanity’. As a result, while these descriptions have eventually led towards the international illegitimizing of the usage of violence and ferocity against civilians by armed military personnel along with political leaders, regarding the use of violence a gap still exists against civilians by governments and groups or individuals on radical or political grounds¹¹¹. In some ways the state can be involved in terrorist activities: as of some levels of general support for terrorist-related groups and organisations, through operational and efficient assistance, introducing or guiding attacks, along with parallel execution of terrorist attacks by authorised agencies of the state. In terrorism, all forms of state participation are placed “below the overall group of terrorist nations, or nation supported or backed terrorism”. Such a title or description has taken completely on the feature of a political or administrative weapon; opposing states assign it to one more, in addition to terrorist organisations use it in contradiction of states acting against them¹¹². In opposing State-Sponsored Terrorism, the question of the involvement of the state in attacks of terrorist has been widely discussed¹¹³. According to their level of participation in terrorism there, this dissertation proposes the following grouping of states:

1- States supportive terrorism

Those states that support terrorism, along with providing fiscal aid and assistance, philosophical support, military, armed or operational support.

2- States operational terrorism

Those states that perform or pledge terrorist actions through groups those are outside the institution¹¹⁴.

¹¹¹ Schrijver, N., 2001. Responding to International Terrorism: Moving the Frontiers of International Law for ‘Enduring Freedom’?. *Netherlands International Law Review*, 48(03), pp.271-273.

¹¹² Paust, J.L., Scharf, M.P., Sadat, L., Bassiouni, M.C., Gurulé, J., Zagaris, B. and Williams, S.A., 2000. *International criminal law* (pp. 857-62). Durham NC: Carolina Academic Press.

¹¹³ Goldstone, R., 2005. Combating Terrorism: Zero Tolerance for Torture. *Case W. Res. J. Int'l L.*, 37, p.343.

¹¹⁴ Guillaume, G., 2004. Terrorism and international law. *International and Comparative Law Quarterly*, 53(03), pp.537-538.

3- States perpetrating terrorism

Those states are committing terrorist acts out of the country through their authorised bodies and its intelligence services, or via the members of its military security forces or their straight agents. In other words, other nations with the intention of achieving political aims and objectives without stating war, states intentionally attacking civilians¹¹⁵.

2.8.2.3 Guerrilla Warfare as a Particular Science

In the theoretical development, the next breakthrough was T. E. Lawrence's¹¹⁶ expression that some factors if followed beside certain lines, guerrilla warfare might be shown an exact science. Periodic the main factors that Lawrence eventually had in mind were: an indisputable guerrilla base, a regular and periodic opposing army of restricted strength and power using the task of monitoring a wide area also towards a concerned population. What were needed by guerrillas themselves in these conditions were speed along with endurance and patience, sovereign lines of supply along with special utensils to paralyse the enemy's lines of communication. "Granted flexibility, safety and security (in the method of rejecting targets towards the enemy), time, as well as doctrine (the main idea towards converting each and every subject to kindliness), with the rebels victory will rest¹¹⁷".

2.8.3 Terrorism or National Liberation Movement

To make all classifications of terrorism worthless a widespread attempt is to bump overall activities of terrorist along with the struggle to (or "intending to") achieving national liberation. As a result, for example, it has been time and again stated by the Syrian authority that Syria doesn't assist terrorist groups; rather, it only funds freedom movements foreign along with government ministry of interior of the UAE Arab League repeated this position in the year of April 1997 while meeting in Egypt (Cairo). In this document it was named as 'Strategy of Arab against terrorism struggle,' their aggressive activities were emphasized and pointed at 'freedom as well as self-government' are eventually not in the group of terrorism. Despite the fact that hostile actions against different regimes or relatives and relations of

¹¹⁵ Cohen, A., 2011. Prosecuting terrorists at the International Criminal Court: reevaluating an unused legal tool to combat terrorism. Mich. St. U. Coll. L. Int'l L. Rev., 20, p.219.

¹¹⁶ Franklin Mark Osanka, 1962. Modern Guerrilla Warfare. The George Washington University. Human Resources Research Office.

¹¹⁷ Werle, G. and Jessberger, F., 2014. Principles of international criminal law. OUP Oxford pp.43-44.

leaders will ultimately not be well-thought-out political attacks however then again rather criminal attacks¹¹⁸.

In relations towards the 'end' (national liberation) so will again discuss the means of terrorism. If there will be movement to liberate from any foreign oppression, then that movement cannot be considered as an act of terrorism. This can again be stated as', 'One man's freedom warrior is an additional man's terrorist,' in which it is been stressed that all depends on the viewpoint along with the worldview of a single one doing the describing. One of the former presidents of USSR has given out a statement in the year 1981, all through the visit of the former Libyan ruler, Col. Muammar Qadhafi: "either for the willpower of the general public or the laws of olden times imperialists have no respect and concern. Indignation causes their Liberation struggles¹¹⁹.

2.9 A New Conceptualization for the 21st Century

One of the important aspects of guerrilla warfare filled through revolutionary principles was the participation of citizens of different nations in what were fundamental struggles of the state. During the era of Cold War, Che Guevara was one of the essential, and prominent figures who was born with Argentinean nationality but then again played a major role in the Cuban Revolution in addition to that, afterwards, passed away while attempting to bring a socialist revolution in the nation of Bolivia. During the time of jihad, this phenomenon, in the end, reached its peak that the US has helped to foster in contradiction of the Soviet Union in Afghanistan which saw the strange get-together of Muslim youth that was religious-minded as of across the whole world. As a result, the terrorism came back to the US on Sep 2001 by bombing buildings in Washington. However, as of Russia to India along with from Algeria to the Philippines, a lot of other countries have furthermore had to bear the outcome blows from the Afghan battleground¹²⁰. One can predict the recurrence of guerrilla warfare that was classical as a means active by those nations which are less powerful when faced through definite or planned the United States military interference conceptualization of Guerrilla Warfare by way of the recent turn of the United States in the direction of an 'imperial' policy. During over the past times concluded 'Action Iraqi Freedom 'This whole phenomenon was on demonstration, albeit in an uncertain manner. As of the viewpoint of the US, of course,

¹¹⁸ Byers, M., 2002. Terrorism, the use of force and international law after 11 September. *International Relations*, 16(2), pp.155-157.

¹¹⁹ Duffy, H., 2005. The "war on Terror" and the Framework of International Law (p. 219). Cambridge: Cambridge University Press.

¹²⁰ Travalio, G.M., 2000. Terrorism, international law, and the use of military force. *Wis. Int'l LJ*, 18, p.145.

these wars could be named as little wars, a phenomenon Britain along with other majestic powers had to struggle along with earlier in the decades before the WW1. In other possible target nations United States success or else its failure would, in the long run, regulate whether history is inscribed starting the viewpoint of Small Wars or as of that of a reborn guerrilla movement¹²¹.

2.10 Targets and Responses

At the same time as not all the political violence is focused on the very similar objectives, not all political-related violence is identical either. Towards diverse state responses distinguishing among the targets as well as the aims and objectives of systematic, organised communal political violence offers to rise. If you are thinking of a single political moment terrorism could not be justified; it is essential to understand the privileged political as well as cultural background in which violence occurs. This study and analysis suggest there are a huge number of relationships across fights in crises in the War on Terrorism: politically motivated Islam is prominent, but then again not as a motivator instead of violence. Religion is a meter of identity and character chosen by minorities of Muslim where they are controlled instead of representing a “clash of culture and civilisations” or else the inconsistency of Islam along with Christianity (or Judaism, or Atheist, or Freethinker, or Nigerian original religions)¹²². That violence and strength arise is furthermore a function of state failure and disaster than a clash of civilisations. One of the most important features that are always linked with terrorism is recognised as Jihad, and it is the rise of violence and ferocity as a reaction to a failure of the state. In the worldwide war that was lead against terrorism; “terrorist” violence is eventually linked along with political organisations and groups that one or the other way challenges the whole state in a separatist or nationalist fashion, or fight a severe authoritarian or heavy-handed request of the state interests, together with programs of forced assimilation¹²³.

There is always a danger towards misinterpretation of the reasons and motives of terrorist groups or misjudging the danger and risk they pose despite the fact that organisations like al Qaeda, ISIS seek to promote the idea and motive that politically related violence is

¹²¹ Reisman, W.M., 1999. International legal responses to terrorism. *Hous. J. int'l L.*, 22, p.3.

¹²² Carberry, J.A., 1999. Terrorism: A global phenomenon mandating a unified international response. *Indiana Journal of Global Legal Studies*, pp.718-719.

¹²³ Schrijver, N., 2001. Responding to International Terrorism: Moving the Frontiers of International Law for ‘Enduring Freedom’?. *Netherlands International Law Review*, 48(03), pp.271-273.

completely lined with an “internationalist” Islamic empire. According to some researchers, even though al Qaeda is a restricted problem, whose numbers, as well as “terrorist helpers, are limited and perhaps controllable.” Beginning from Morocco to Malaysia having a fantasy of building an Islamic empire or and the Islamic Kingdom is not the same as having the ability, skill and opportunity to do so. In order to be certain, Osama bin Laden along with his deputy companion Ayman al-Zawahiri eventually seek to tap into a socioeconomic obstruction in addition to that ignite a larger clang of civilisation¹²⁴. Though, the people who are living from Morocco to Malaysia have a say in their expectations; along with they have devastatingly comprised their general characteristics, straightforward and single forms of Islamic worship, as well as democracy. By the end of the year 2005, it has been noted by the freedom house that essential nations situated in the Middle East in the previous four years have eventually seen substantial and steady progress toward forming freer or open societies. In addition to that, there are a lot of Muslim-majority nations which are now considered as democratic—Indonesia, Malaysia, Mali, Senegal, and Kuwait. To provide public goods with the key, the United States foreign policy method should be to encourage development along with the state’s ability¹²⁵.

2.11 International policy against Terrorism/ Guerrilla Warfare/ Insurgency

It is important to have a fair amount of perspective regarding intentions behind terrorist acts, guerrilla warfare and insurgents. When post-colonial violence is taken into consideration with historical perspective, since World War II, most colonial wars have been won by colonial subjects against imperial power. Due to Jewish and Arabic violence, British mandate was taken over by United Nations, whereas India gained independence on its terms. On a more recent note, the Soviet bloc located in Europe wrestled against the Soviet Union to gain independence, resulting in the formation of smaller independent states such as Uzbekistan, Georgia, Chechnya, Afghanistan, Azerbaijan and Ukraine. African and South American nations have gained independence after violent civil wars/ anti-government coups. As the nature of insurgent actions varies and success rate improves, the counter-insurgency policy is required to be reassessed¹²⁶.

¹²⁴ Gasser, H.P., 2002. Acts of terror, “terrorism” and international humanitarian law. *Revue Internationale de la Croix-Rouge/International Review of the Red Cross*, 84(847), pp.567-570.

¹²⁵ Paust, J.L., Scharf, M.P., Sadat, L., Bassiouni, M.C., Gurulé, J., Zagaris, B. and Williams, S.A., 2000. *International criminal law* (pp. 857-62). Durham NC: Carolina Academic Press.

¹²⁶ Ibid.

Two factors can impact counter-insurgency policy sufficiently consists of government response and environment response. The insurgent violence can be curbed down when the centralised government can take radical action in dispelling insurgent violence. The majority of the antagonism occurring against the host government by guerrilla organisations and insurgent groups is due to the inappropriate behaviour shown by the government to all groups, maintaining hegemony over businesses/ affairs. In the case of Sri Lanka, the LTTE (Liberation Tigers of Tamil Eelam) was a terrorist uprising due to the marginalisation of minority groups which aggravated national peace situation, involving intervention by Indian Army¹²⁷.

The minority groups should be tackled using fair elections as well as included in local accountability to prevent any desperate measures taken by them otherwise. It starts a process of self-determination of rights struggle by subgroups. The political process of a country is disturbed when violent/ terrorist inclinations increase from a subset. Insurgency inclinations can also be curbed down economic capabilities are increased, resource management is furthered for minority groups, whereas autonomous control of international corporations could also hamper terrorist tendencies to a considerable extent. Regional utilisation is amped up, usage of available resources, curbing levels of unemployment, giving the general population a true sense of control over their actions, equal distribution of wealth works in favour of maintaining regional peace, discontent and averting strife¹²⁸. It could be reasonably asserted that leaders of insurgents have educated individuals, a spike in the creation of employment and industrial capacities of the region would increase satisfaction levels as the air of discontent wanes off. Moreover, the contributing members of the society are prevented from terrorist activities as monetary gains are well within sight. As per O'Neill, he confidently asserts that national campaigns in an attempt to deal with terrorism and guerrilla warfare can ramp up support by tackling the needs of the regional population to best of their abilities¹²⁹.

Apart from the economic and political concessions, land rights/ reforms could be addressed, giving the aggravated group a representation via ownership and rights. The majority of such grievances can be dealt with by mere compromises and have the ability to prevent

¹²⁷ Ibid.

¹²⁸ Dumitriu, E., 2004. EU's Definition of Terrorism: The Council Framework Decision on Combating Terrorism, *The German LJ*, 5, p.585.

¹²⁹ Aaron, David (2008), *In Their Own Words: Voices of Jihad -- Compilation and Commentary*. Santa Monica, CA: RAND Corporation.

accumulation of poverty, discontent amongst people, dissension in ranks and terrorist inclinations¹³⁰. On the other hand, O'Neill has asserted that programs in the absence of competent administrators are akin to hollow promises. Competent managers in the lack of apt programs are powerless, withal inept programs may simply exacerbate the existent problems. To counter the insurgent/ terrorist activities, economic and political undercurrents are crucial to being taken in context since insurgent activities are seldom without a reason. It largely relies on conditional propaganda and secrecy to ramp up popular group for the regional population¹³¹.

When the situational conditions and intelligence is leveraged, a successful country can use amassed information to defeat the nascent terrorist group which could gain momentum. Whereas certain terrorist groups/ insurgencies are unavoidable, usage of resources minimises the likelihood of such activities. International organisations can also participate in counter-terrorism which could add a dimension to the policy against terrorism¹³². With the help of apt management of social services and invoking welfare programs, the demands of insurgents could be dealt with. A unified agreement involving freedom fighters-state can assist in meeting the local requirements of the minority/ subgroups¹³³.

When western coalitions take aggressive/ economic and political actions against terrorist/ insurgent groups, their presence as per most cases aggravates the resistance and propaganda. As a case-in-point, the presence of United States in South American terrain is largely associated with catalysing numerous communal and nationalistic conflicts for multiple decades, affirmed by Guevara during the 1960s¹³⁴. Moreover, the American involvement in third-world countries such as Asiatic region, Middle-East and South American terrain can assist in curbing down regional tensions where assistance with localized groups such as Arab leagues, Association of South East Asian Nations (ASEAN), Organization of African Unity and Mercosur.¹³⁵ It can help in recognizing the trigger factors and highlight the potential red-flags by particular regions. To this effect, the counter-insurgent policy also suffers in this

¹³⁰ Amble, J.C., 2012. Combating terrorism in the new media environment, *Studies in Conflict & Terrorism*, 35(5), pp.339-353.

¹³¹ Ibid.

¹³² Rajendra Prasad & Dharmendra Kumar Upadhyay, 2013. *Terrorism and Indias Security in 21st Century*, Published by Raj Publications, New Delhi, India, p6-15.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Mercosur is the common market of South America created by the Treaty of Asuncion (capital of Paraguay) in 1991. The aim was to achieve a real customs union with a common external tariff. Argentina, Brazil, Paraguay and Uruguay were at the origin of this agreement. In 2006, Venezuela becomes the fifth permanent member before being suspended in 2017.

regard. Due to illegal actions of US, the weaker group gains international support/ voice due to the heinous atrocities committed¹³⁶.

The extent of American penetration into regional and international countries far exceeds those of International Organisations (IO). When American intervention and unneeded climate of unrest is eliminated to a certain extent, international organisations (IO) can step in and take evasive action, facilitating peace in the region. By this extent, the anti-American rhetoric and imperialism tactics will fade away in the long-run. As the terrorist groups in a particular area counter the antagonistic element (US), it attains certain leverage in calling its war on fair grounds. As per Sarah Sewell, United States is preordained to secure the civilians, as opposed to eliminating the opposition, their premier priority. The civilian population is the epicentre of gravity, which is inadvertently affected in the ensuing onslaught. More so, in pursuing these tactics, the terrorists/ insurgents often use civilians as a shield against the impending onslaught. As a result, the popular support is snatched, with the group starving for popularity. Furthermore, due to unplanned casualties and deaths due to such operations, the terrorist sentiments are further increased as victims of aggrieved families join the ranks of terrorist groups to avenge their deaths. As a result, the support of the host nation also decreases to this end, resulting national chaos. The state becomes unpopular as it is inept in protecting the friendly fire as well as enemy combatants from the reach of civilians, becoming collateral damage¹³⁷.

The most tools against increasing terrorist/ insurgent groups' penetration into a country is to counter them with counter-insurgency strategies. Since the public opinion may sway in favour of the terrorist groups, the lack of public/ national support against these groups as the government takes the necessary step will advertently may them an unpopular group in case of the regional domain. Using nationwide propaganda against these groups, informational efforts can be instituted for combating unrest and civilian casualties. As a result, the revolutionary segments of the populace will observe dissuading trends towards these self-proclaimed torch-bearers of justice¹³⁸. Whereas the constitutional freedom has been allotted to press in most countries, censorship policies are needed to be as forceful to decrease the spread of terrorist causes and creating recognition for such groups. Responsible journalism and reporting is an integral step in giving redundant coverage to terrorist groups and

¹³⁶ Shultz, R.H. and Dew, A.J., 2009. *Insurgents, Terrorists, and Militias: The Warriors of Contemporary Combat*. Columbia University Press.

¹³⁷ Ibid.

¹³⁸ Ibid.

highlighting their causes. The terrorist groups and mass media have developed a symbiotic relationship from which mass population ultimately suffers since the recent undue credit for its efforts against an imperial power, whereas the latter capitalises on ratings¹³⁹.

As per Nacos, television has provided the best medium for propagation of terror and recognition due to its ability to transmit visual content over a broad spectrum of people. Therefore, it can be reasonably asserted that television/ media has played a double-edged sword in insurgent policy and counter-terrorism policies. When terrorist/ insurgent messages are propagated through mass media, it assists their cause conveniently. It reduces the effectiveness of counter-insurgency propaganda to this end. The opposition messages and hate-mongering can be deflected by transmission of information, increasing educational efforts and creating opportunities, so as to douse the efforts of growing terrorist sentiments. Moreover, spreading propaganda has become a de-facto strategy for terrorist groups, whereas countering their agenda with responsible reporting is a pivotal initiative to be taken by both journalists and government. When the incident is removed from public knowledge, decreasing the amount of international attention paid to it, as Netanyahu asserts the common tree analogy, these groups could eventually disperse. Since mass media was first employed during 1972 Munich Olympics where Israeli sportsmen were taken a hostage, subsequently became a skeletal method for terrorist activities to thrive and propagate. When the element of oxygen of publicity is eliminated, the advocacy of terrorist acts is driven down in popular media. During the past decade, the increased terrorist groups and events have received international fame and acknowledgement which inflames the national front. Such endeavours are akin to the thorn in anti-terrorism endeavours by agencies/ government at large since the key purpose of terrorism is self-fulfilled¹⁴⁰.

In summing up, this chapter has already examined the conceptual and legal difficulty involve in the search for the generally accepted definition of the term of terrorism. The objective of terrorism and guerrilla warfare may well be the same; but they are distinguished from each other by the targets of their operations. A legitimate cause does not act legitimate the means and methods utilized; therefore, the next chapter will examine peoples actively pursue their right to self- determination, and the relationship between the struggle for self determination and terrorism.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

Chapter Three

The qualifications of terrorism in International Humanitarian Law and the issue of National Liberation Movements

3.0 Introduction

International humanitarian law of armed conflict is a legal discipline in its own right. Formerly called "the law of war", and it is above all branch of public international law of which it presents all the characters¹⁴¹. It developed at a time when the use of armed force was a state practice in international relations, unlike the present time when this practice became prohibited by a rule of international law contained in the fourth paragraph of the second article of the United Nations Charter. Exceptions to this prohibition are permitted in case of individual or collective self-defence of measures taken by the Security Council, in the manner provided for in Chapter VII of the United Nations Charter, and when people exercises its right to self-determination in a national liberation war¹⁴².

International Humanitarian Law (IHL) tends to reduce the consequences of any declared war by *inter alia* and trying to protect individuals not taking part in hostilities. Michel Deyra considers IHL to be above all the rights of conciliation and persuasion on the basis of a rational and reasonable approach to belligerency¹⁴³. Eric David clarified the four main principles of the modern law of armed conflict¹⁴⁴:

¹⁴¹ See Eric David, 199. Principles of the law of armed conflict, Bruylant publisher- Brussels, second edition, p. 10-28. According to several authors, IHL was born as a law governing relations between belligerent states. It is a branch of public international law since it contains rules concerning armed conflicts, which unfortunately remain an extreme type of interstate relations, and it was based on legal regulation measures applicable during the hostilities of war in international law or in the context of civil wars. This humanitarian law, called the law of armed conflict, is based essentially on four Geneva Conventions of 12 August 1949 and their two Additional Protocols of 8 June 1977. These are the laws of one law that regulate violence and conduct hostilities on the basis of state conservation and the demands of the civilian population. See also Michel Deyra, 2002. The Essentials of the Law of Armed Conflict, ed. Gualino, Paris, p. 10-13. The author stresses that there are currently about thirty international texts on humanitarian law. Among these are: the 15 Hague Conventions of 1899, the Geneva Protocol of June 17, 1925, the 4 Geneva Conventions of August 12, 1949, the Hague Protocol of May 14, 1954, the two Additional Protocols of the 8 June 1977, the United Nations Convention of 10 April 1981 and the Treaty of Paris of 18 July 1998. See also Francois Bugnion, 2002. "Just war, war of aggression and international humanitarian law", in RICR, No. 847, p. 523-546. According to this author, IHL must be applicable whenever there is a de facto armed conflict.

¹⁴² According to Resolution 2105 (XX) Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples [1965] UNGA 96; A/RES/2105 (XX) (20 December 1965), the legitimacy of the use of force (to enable the exercise of the right of peoples to self-determination) is recognized in Article 1 common to both United Nations Covenants on Human Rights.

¹⁴³ Michel Deyra, 2009. The essentials of the Law of Armed Conflict, Paris, Gualino, p.10-12.

¹⁴⁴ Ibid, P-5.

- 1- The obligation to always distinguish between combatants and non-combatants, and consequently the rule of the immunity of the latter;
- 2- The obligation to repress the violation of rules applicable to combatants;
- 3- The obligation not to use any means to fight the enemy;
- 4- The rejection of any discrimination in the care provided to the wounded and sick¹⁴⁵.

He added that this right is subdivided into two categories of rules; on the one hand the rules governing the conduct of hostilities (methods and means of combat); on the other hand, those relating to the treatment of persons in the hands of the enemy (prisoners, sick, shipwrecked, civilians in the occupied territories, etc.)¹⁴⁶.

As far as terrorism is concerned, International Humanitarian Law (IHL) does not define it, but it prohibits most acts commonly considered terrorist acts when they are committed in peacetime or in time of war. In accordance with one of the fundamental principles of humanitarian law, parties to an armed conflict must at all times make a difference amongst civilians and warriors, and also between civilian items and military objectives. Terrorist acts can be committed in wartime as well as in peacetime since IHL applies only in situations of armed conflict, and it does not regulate acts of terrorism perpetrated in peacetime. Professor Vincent Coussirat-Couster stresses that "terrorists cannot be blamed for violating humanitarian law in times of peace. Unlike the goals of the national liberation movements, terrorist movements do not aim to create a state in the process of becoming independent"¹⁴⁷.

By expressly prohibiting all acts aimed at spreading terror among the civilian population,¹⁴⁸ humanitarian law¹⁴⁹ punishes the following acts:

¹⁴⁵ Eric David, 2008. *Principles of the Law of Armed Conflict*, Brussels, Bruylant, 4th ed., 1117 p. cit. p. 42, 64 and 65. The first rules are called "Hague law" by reference to the city where many of them were adopted in 1899 and 1907; the so-called "Geneva law" seconds: they appear in the Conventions signed at Geneva in 1864, 1906, 1929 and 1949.

¹⁴⁶ Ibid. According to Article 13 of the Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949 on the Protection of Victims of Non-International Armed Conflicts (Protocol II): "1. The civilian population and civilians shall enjoy general protection against dangers resulting from military operations. In order to make this protection effective, the following rules will be observed in all circumstances. 2. Neither the civilian population nor civilians should be attacked. Acts or threats of violence whose main purpose is to spread terror among the civilian population are prohibited. 3. Civilians shall enjoy the protection afforded by this Part unless they participate directly in the hostilities and during the period of such participation". See Michel Veuthey, 2005. *International Humanitarian Law in the Face of the War on Terror*, Terrorism, Victims and International Criminal Responsibility, op. cit., p. 516-529.

¹⁴⁷ Ibid.

¹⁴⁸ Art. 51, para. 2, Protocol I and Art. 13, para. 2, Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

¹⁴⁹ See the four Geneva Conventions, as well as the two additional protocols to these conventions.

- "attacks against civilians and civilian objects"¹⁵⁰ : Article 13, paragraph 2 of Additional Protocol II prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population in non-international armed conflicts";
- "attacks without discrimination": paragraph 2 of art. 51, para. 4 of Protocol I prohibits "acts or threats of violence the main purpose of which is to spread terror to the civilian population". Its paragraph 5 defines indiscriminate attacks and its paragraph 6 reaffirms "the prohibition of reprisals against the civilian population or civilians";
- "attacks against facilities containing dangerous forces" ¹⁵¹;
- "the taking of hostages" ¹⁵²;
- "the killing of persons who do not participate or no longer participate in hostilities"¹⁵³;
- "attacks against captured, wounded, shipwrecked or prisoners of war"¹⁵⁴;

Article 33 of the same Convention prohibits collective punishment, as well as any measure of intimidation or terrorism in its paragraph 1, while paragraph 3 of the same article prohibits retaliatory measures against protected persons and their property. These measures, as stated in the commentary of the International Committee of the Red Cross (ICRC), are "intimidation measures intended to terrorize the population" ¹⁵⁵, by discriminating against the military and the innocent. The use of violence for political purposes is not a new phenomenon. What is unusual in these new waves of violence is the danger and threat of international terrorism that uses planes and explosives, and is likely to gain access to weapons of mass destruction.

In the report of the Commission for the Prevention of Discrimination and Protection of Minorities,¹⁵⁶ special rapporteur Kalliopi K. Koufa stated that terrorism violates human rights, threatens life, freedom, dignity of people, democratic society, social peace and public order. On 27 June 2001, the Commission on Human Rights prepared another report which

¹⁵⁰ Art. 51, para. 2, and 52, Protocol I.

¹⁵¹ Art. 56, Protocol I and art. 15, Protocol II.

¹⁵² Art. 75, Protocol I; common art. 3 to the four Conventions and art. 4, para. 2b, Protocol II and Art. 34 of the Fourth Convention.

¹⁵³ Art. 75, Protocol I; common art. 3 to the four Conventions and art. 4, para. 2a, Protocol II.

¹⁵⁴ Ibid.

¹⁵⁵ These prohibitions are addressed to governments and other non-state parties to conflict, and the ICJ, in the Nicaragua Judgment, has described them as applicable in all situations of conflict as "basic considerations of humanity". C.I.J. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, Reports 1986, p. 14 et seq., section 215-220.

¹⁵⁶ Report on the Question of Terrorism and Human Rights 1999, prepared by the Economic and Social Council, based on its Resolution 1998/29 of The Sub Commission on Prevention of Discrimination and Protection of Minorities, and prepared by Ms. Kalliopi K. KOUFA, E / CN.4 / Sub.2 / 1999/27, 7 June 1999.

emphasized the need to distinguish between terrorism and armed conflict¹⁵⁷. In paragraphs 129-131, the authors stated that terrorist acts are acts of violence and violations of human rights, humanitarian law and international conventions which tend to regulate international relations. Similarly, in resolution 50/186 on human rights and terrorism, the UN General Assembly affirmed that terrorism is a destruction and violation of human rights, fundamental principles of human rights, democracy and a threat to the security of States¹⁵⁸.

In situations of armed conflict, state or individual terrorist acts by armed groups constitute violations of the Geneva Conventions of 1949 relating to the protection of the victims of armed conflict, since they reflect a practice of terror directed against to the civilian population. A new broader concept of terrorism has been adopted by the representatives of certain States in matters relating to terrorism in the organs and bodies of the United Nations. Terrorism is connected with state resort to force. This is reflected in the official documents and the records of the proceedings¹⁵⁹.

The 1973 report of the Special Committee on International Terrorism describes this concept of terrorism to which several States subscribe: "Terrorism practiced on a large scale and by the most modern means against entire peoples for the purpose of domination or control, interference in their home affairs, armed attacks perpetrated on the pretext of retaliation or preventive action by States against the sovereignty and integrity of third States, as well as the infiltration of terrorist groups or agents into the territory other States "¹⁶⁰.

In recent years, the question has arisen as to whether terrorism, which is an act of violence, is a war or a situation of armed conflict. Former US President George W. Bush condemned the attacks of 11 September 2001 against the World Trade Centre and the Pentagon calling them "acts of war"¹⁶¹. His formulas all referred to war using a warrior vocabulary and he said: "International terrorists, including members of Al Qaeda, have been attacked by the United States armed forces"¹⁶². Also the former Al Qaeda leader Usama Bin Ladin, for his part, used the very concept of "holy war" (jihad)¹⁶³.

¹⁵⁷ Report E / CN / .4 / Sub.2 / 2001/31, June 27, 2001.

¹⁵⁸ Resolution 50/186 (1996), adopted by the General Assembly of the United Nations on 6 March 1996, A / RES / 50/186.

¹⁵⁹ See, inter alia, General Assembly resolution 40/61, adopted on 9 December 1985.

¹⁶⁰ See Report A / 9028 of 1973 of the Special Committee on International Terrorism, para. 24.

¹⁶¹ See the speech by former US President George Bush to the Congress, on September 20, 2001, entitled "On September 11, the enemies of freedom committed an act of war against our country", DAI, No. 21, November 1, 2001, p. 833.

¹⁶² Ibid.

¹⁶³ See the Final Report of the National Commission on Terrorist Attacks on the United States, 2004, p. 65-68

The attacks of 11 September 2001 have raised profound questions about the notion of "armed conflict", which is not precisely defined in conventional humanitarian law in the absence, in particular, of defining the threshold from which violence can be considered and described as an armed conflict. Some authors¹⁶⁴ claim that *jus in bello* applies to terrorism because, on the one hand, terrorist acts are prohibited by international humanitarian law protecting civilians and, on the other hand, they provoke terror among individuals, civilians or among the civilian population as a whole¹⁶⁵. Terrorist acts may, however, trigger an international armed conflict when committed by a State or its *de facto* agents-against another State, or a non-international armed conflict when committed by an organized armed group fighting against a state and its governmental authorities¹⁶⁶. However, terrorism can not constitute an armed conflict, as it implies the existence of two identifiable parties to the conflict, a condition *sine qua non* for the application of the laws of war which is not the case with terrorist groups who work in hiding and do not carry arms openly. In both legal and political aspects, there is common disagreement about such a broadening of the concept of terrorism leading to the following questions:

- Is the international community moving away from the classical form of war?
- Is the terrorist group such as ISIS, Al Qaeda, ANF terrorist attacks in Arab countries and in Western countries, particularly in Iraq, Syrian and Europe, a war in the legal sense of the term?
- Can the terrorist acts of September 11th be assimilated to acts of war when the enemy is not a state and does not have a regular army?

According to Clausewitz, war is "an act of violence the object of which is to compel the adversary to comply with our will"¹⁶⁷. However, this notion has now become confused by the existing growth of international violence which, through terrorism, introduces non-state actors who do not use weapons and do not easily identify their identity or goals.

Resolution 23 of 14 September 2001, of the United States Congress, authorized President Bush to resort to any necessary and appropriate use of force against nations, organizations or persons, who planned, authorized, committed or aided terrorist attacks¹⁶⁸. The United Nations

¹⁶⁴ Marco Sassoli and Antoine Bouvier, 2003. A right in the war? International Committee of the Red Cross (ICRC), Geneva, p. 119.

¹⁶⁵ Georges Abi Saab, 2003. "The Specificities of Humanitarian Law", in Christophe Swinarski, studies and essays on International Humanitarian Law and the Principles of the Red Cross (ICRC), p. 265-280.

¹⁶⁶ Hans-Peter Gasser, 1968. "Prohibition of acts of terrorism in international humanitarian law", RICR, No. 760, p. 207-221.

¹⁶⁷ Clausewitz, Carl von, Michael Howard, Peter Paret, and Bernard Brodie, 2008. On war. Oxford Worlds Classic, Oxford University Press, p-31

¹⁶⁸ See resolution 23 of 14 September 2001.

Security Council in its resolution 1368, made it possible to combat terrorism "by all means".¹⁶⁹ This expression implies the use of armed force within the meaning of Chapter VII of the Charter, without expressly stating it and without specifying when and in what legal context acts of terrorism turn into acts of war¹⁷⁰. This chapter will analyze, on the one hand, the distinction between armed conflicts and acts of terrorism, and, on the other hand, the question of the classification of acts perpetrated by national liberation movements and their military actions against occupation. Also for the Arab and Islamic countries, it is indeed necessary to make a clear distinction between terrorism and national liberation struggles. This subject is also dominant for the Organization of the Islamic Conference as shown in Article 2 of the Convention of this Organization to combat international terrorism which states: "are not considered as terrorist crimes cases of struggle led by the peoples including armed struggle, against foreign occupation, colonialism, aggression and domination, for liberation or self-determination in accordance with the principles of international law "¹⁷¹.

3.1 The necessary distinction between Terrorism and Armed Conflict

In the search for a definition of terrorism, it is vital to make the distinction between this phenomenon and armed conflict. In almost most of the studies made so far in the United Nations framework, the need for this distinction is regularly indicated. In the report of the Special Committee on International Terrorism, for example, it is noted that the Committee distinguished in its work between terrorism and armed conflict on the one hand, and terrorism and the right of peoples to self-determination and the right to fight against foreign occupation, on the other hand. In the UN General Assembly, many debates among states have expressed concerns about the wars of national liberation, some viewed from the perspective of the right to self-determination. While some States are determined not to allow the debate on terrorism to unduly interfere with this fundamental principle. Others have focused on what is increasingly referred to as "ethnic conflict" or even "nationalist / separatist conflict", sometimes even giving the impression that any such conflict is necessarily linked to terrorism¹⁷².

¹⁶⁹ Resolution 1368 (2001), adopted by the Security Council on 12 September 2001.

¹⁷⁰ Ibid.

¹⁷¹ Convention of the Organisation of the Islamic Conference on Combating International Terrorism, 1999.

¹⁷² General Assembly Seventy-Third Session, 14th and 15th meetings, Member States Highlight Complexity of Terrorist Threats, as General Assembly Debate Enters Fifth Day, GA/12072, 29 Sept 2018.

One of the reasons for the need to make a clear distinction between armed conflict and terrorism is that the law of armed conflict or *jus in bello* applies as soon as there is an armed conflict. Its rules govern military operations and weapons (Hague law) and the protection of victims of armed conflict (Geneva law). The first question is whether the law of armed conflict is a relevant body of terrorism. It is therefore necessary to know whether terrorism constitutes an armed conflict, especially when it comes to attacks against military objectives, such as the massacre of Marines in Beirut by Hezbollah on 23 October 1983¹⁷³, the attack on the Dhahran US military complex in Saudi Arabia in June 1996¹⁷⁴, or the attack on the destroyer USS Cole on October 12, 2000 in Yemen¹⁷⁵. Also during an armed conflict combatants can use force against military targets. However, will certain terrorist attacks such as those mentioned above, perpetrated in the context of an armed conflict, be considered as acts of war? In order to answer these questions, the next sections will try to find out first whether the law of armed conflict can be applied to international terrorism and whether acts of terrorism can be qualified as acts of war.

3.2 The inapplicability of *jus in bello* to terrorism

The armed conflict is a belligerent situation that assumes the existence of two identifiable parts equipped with military equipment engaged in intense military operations (acts of war) to correspond to the customary definitions of armed conflict, which is not the case of terrorist groups operating in hiding and have no distinctive signs and do not openly bear arms. Terrorism is neither an international armed conflict nor a non-international armed conflict in the legal sense of these two terms. The first is an inter-state conflict, and the second is a conflict that has erupted in a state in the form of a civil war (between non-state entities or between them and the state's official army) or in the form of a national liberation war against an occupying foreign army.

International Humanitarian Law relating to international armed conflicts applies, in the case of declared war or any other armed conflict arising between two or more of the High Contracting Parties, even if the state of war is not recognized by one of the parties. Similarly, the same body of law applies in all cases of occupation of, all or part, the territory of a High Contracting Party even if such occupation does not meet any military resistance¹⁷⁶.

¹⁷³ Jim Michaels, 2013. Recalling the deadly 1983 attack on the Marine barracks, USA Today.

¹⁷⁴ Rob Crilly, 2018. US ruling on Khobar Towers blast shows Iran's hand in Middle East terror, The National News Library.

¹⁷⁵ CNN Library, 2018. USS Cole Bombing Fast Facts, CNN Library, 15 October 2018.

¹⁷⁶ Common Article 2 to the four 1949 Geneva Conventions.

In the following sections, we will specify the legal criteria for conflicts non-international armed forces, and we will legally distinguish non-state entities from terrorist groups.

3.3 Legal criteria of Non-International Armed Conflicts (NIAC)

In the event of an armed conflict which is not of an international character and arising in the territory of a State, Additional Protocol II¹⁷⁷ sets out criteria for qualifying a military action as a non-international armed conflict (i.e. "internal" or "civilian"): organized armed groups of the conflict exercise control over part of the territory and carry out continuous military operations. Using identical terms, the International Criminal Tribunal for Rwanda (ICTR) in its first judgment focused on verifying the applicability of the law of internal armed conflict¹⁷⁸, based on Article 3 common to the Geneva Conventions, in order to distinguish the internal armed conflict from troubles caused by an act of banditry. The second chamber emphasized two criteria: the "intensity of the conflict" and the "organization of the parties to the conflict"¹⁷⁹.

3.3.1. Control of territories by armed combatants

As for the first criterion, the confrontations must be violent, and as for the second, the combatant parties must be organized, ranked and considered as real armies containing regular combatants¹⁸⁰. The ICTR Trial Chamber added that these armed parties must also exercise control over part of the territory, with reference to the first paragraph of Article 1 of the Second Additional Protocol, which provides for its application to conflicts in which " (...) organized armed groups which, under the leadership of a responsible command, exercise control over a part of their territory to enable them to conduct continuous and concerted military operations (...) "¹⁸¹.

¹⁷⁷ See Article 1 Section 1 of Additional Protocol II of 10 June 1977 applicable to non-international armed conflicts.

¹⁷⁸ ICTR, 2 September 1998, *The Prosecutor v. Jean Paul Akayesu*, No. ICTR-96-4-T, Section 615. Based on the text of Article 3 common to the Geneva Conventions 1949, the Trial Chamber notes in Akayesu that the prohibitions therein shall apply to any conflict as long as it constitutes an armed conflict not of an international character.

¹⁷⁹ ICTR, 2 September 1998, *The Prosecutor v. Jean Paul Akayesu*, No. ICTR-96-4-T, Section 617.

¹⁸⁰ ICTR, 2 September 1998, *The Prosecutor v. Jean Paul Akayesu*, No. ICTR-96-4-T, Section 618.

¹⁸¹ Ibid.

3.3.2 Intensity of the conflict

Once the above criteria have been verified, the seriousness of the violations the Geneva Conventions of 1949, Article 2 of the ICTY Statute dealing with "grave breaches"¹⁸². An internal military confrontation sometimes involves the intervention of the state armed forces, such as the wars of national liberation in which armed struggles against the colonial domination of a State or against foreign occupation are involved¹⁸³. In the same way, the internal civil war is transformed into an international armed conflict as soon as there will be foreign interventions. In all these cases, the combatants who may participate directly in hostilities, according to Article 13 of the 1st and 2nd Geneva Conventions, are: members of the armed forces or of a party to the conflict, members of the resistance movements which respect certain conditions, the persons who support and follow the armed forces without directly belonging to it, the members of a regular force who claim authority not recognized by the Detaining Power, the members of the merchant marine crews, and civil aviation of the parties to the conflict, individuals of a population of an unoccupied territory who rise as a group to prevent the advance of the enemy and provided they openly stand arms¹⁸⁴.

Terrorism would not, therefore, have the characteristics of an armed conflict. In The Hague and Geneva Conventions, acts of terrorism cannot be generally characterized neither as an international inter-state armed conflict nor as an internal armed conflict, unless they have been perpetrated in the name of one State against another State. During the conduct of hostilities, it is forbidden to attack undefended towns and villages because only military objectives can be attacked. According to the definition provided by Article 52 section 2 of the First Protocol, a property must fulfil two criteria in order to be a military objective. First, the object must effectively contribute to the military action of one party, and secondly, its destruction, capture or neutralization must provide a specific military advantage to the other party. Terrorist attacks are acts intended to terrorize a civilian population or people who do not take part in hostilities. They thus constitute a violation of the principle that the civilian

¹⁸² According to this article: "The International Tribunal has the power to prosecute persons who commit or order grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts directed against persons or property protected under the provisions of the relevant Geneva Convention: (a) intentional homicide; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) the destruction and appropriation of property not justified by military necessity and carried out on a large scale in an unlawful and arbitrary manner; (e) compelling a prisoner of war or a civilian to serve in the armed forces of the enemy power; (f) depriving a prisoner of war or a civilian of his right to a fair and impartial trial; (g) the expulsion or unlawful transfer of a civilian or his unlawful detention; (h) the taking of civilians as hostages ". See the ICTY Statute.

¹⁸³ Ibid.

¹⁸⁴ Marco Sassoli and Antoine Bouvier, 2003. A right in the war? International Committee of the Red Cross (ICRC), Geneva, p. 198-200 .

population must be safe from hostilities, a primary principle of the fundamental principles recognized by the ICJ¹⁸⁵, and as the basis of modern humanitarian law by the ICTY¹⁸⁶. Acts of terrorism can be perpetrated in peacetime as well as in time of war. In the latter situation, the courts verify the applicability of the law of internal armed conflict before describing certain terrorist acts as war crimes¹⁸⁷. In order for to arrive at this analysis, it is necessary to clarify the difference between non-state entities and terrorist groups.

3.4 The distinction between non-State entities and terrorist groups

The Institute of International Law¹⁸⁸, underlining the threat of the rise of many armed conflicts, involving non-state entities, has not expanded the concept of non-state entities to include terrorist groups¹⁸⁹.

3.4.1. The belligerents of non-state entities

According to Article I of the Berlin Resolution of the Institute of International Law adopted on 25 August 1999, the expression of armed conflicts involving non-State entities refers to internal armed conflicts between the armed forces of a government and those of one or more non-state entities, or between several non-state entities; it also includes internal armed conflicts involving peacekeeping forces¹⁹⁰. In such conflicts, "non-state entities" are not

¹⁸⁵ According to the ICJ: "The main principles contained in the texts forming the structure of humanitarian law are as follows: the first is intended to protect the civilian population and civilian objects, and draws the distinction between combatant and non-combatants (...)", ICJ, 8 July 1996, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Rec. ICJ, 1996, p. 257, para. 78.

¹⁸⁶ ICTY, 14 January 2000, Prosecutor v. Zoran Kupreskic, case no. No. IT-95-16-T, para. 521.

¹⁸⁷ Common Article 3 of the Geneva Conventions provides: "In the event of an armed conflict not of an international character and arising in the territory of one of the High Contracting Parties, each Party to the conflict shall be required to apply at least the following: (1) Persons who do not participate directly in hostilities, including members of the armed forces who have laid down their arms and persons who have been incapacitated by illness, injury, detention, or for any other reason will, in all circumstances, be treated with humanity, without any distinction of unfavourable character based on race, colour, religion or belief, sex, birth or fortune, or any other similar criterion. For this purpose, the following persons are and remain prohibited at all times and in all places with respect to the persons mentioned above: a) harm to life and bodily integrity, including murder in all its forms mutilation, cruel treatment, torture and torture; (b) the taking of hostages; (c) attacks on the dignity of persons, including humiliating and degrading treatment; d) convictions handed down and executions carried out without a prior judgment rendered by a regularly constituted court, with the judicial guarantees recognized as indispensable by civilized peoples. 2) The wounded and sick will be collected and cared for. An impartial humanitarian organization, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict ...".

¹⁸⁸ The Institute of International Law is an institution whose purpose is to promote the development of international law and to act for its implementation. It was founded in 1873 at the Ghent in Belgium.

¹⁸⁹ The Resolution of the Institute of International Law, known as the Berlin Resolution of 25 August 1999, entitled "The Application of International Law and Fundamental Human Rights in Armed Conflicts Involving Non-State Entities", and published in the Yearbook of the Institute of International Law, vol. 68-II, 1999, p. 271-368.

¹⁹⁰ Emily Crawford, 2010. The Treatment of Combatants and Insurgents under the Law of Armed Conflict, Oxford: Oxford University Press, , p42-53.

terrorist groups but they are parties to internal armed conflicts, which oppose government armed forces or fight against similar entities that meet the conditions set out in common article 3 of the Geneva Conventions of 1949 for the protection of victims of armed conflict or article 1 of the 1977 Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)¹⁹¹. Clandestine terrorist groups are excluded from this definition because they do not participate in armed conflicts as parties. We therefore understand that the expression is aimed primarily at *quasi-state* entities (or with a vocation to become a state or a government) which resort to a *de facto* participation in an armed conflict, and which may be insurgents belligerents recognized in as such governments in exile continuing struggle or national liberation movements. According to article 5 of the Berlin resolution, any State and any non-State belligerent party to an armed conflict are legally bound to , with each other and to all other members of the international community , respect the right of humanitarian aid in all circumstances¹⁹². This article highlights everything in particular, that no State or non-State entity can evade such obligations by denying the existence of an armed conflict¹⁹³.

3.4.2. The armed organization of the belligerents

The concept of armed conflict is different from the other concepts such as terrorism, unrest or internal tensions. It is based on objective criteria relating to the intensity of the fighting and the degree of organization of the opposing forces and their control of part of the territory of the State. While the law of armed conflict is applicable, it is not applicable in the case of terrorist attacks or in situations of internal disturbances and tensions that cannot be governed by the Geneva Conventions. However, even in these cases, according to Professor Vincent Coussirat-Coustere, individuals remain protected by international human rights and fundamental human rights. Ultimately, the International Criminal Tribunal for the former Yugoslavia held in *Tadic* that: the standard applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the provisions of Article 3 It focuses on two aspects of a conflict: its intensity and the organization of the parties to the conflict¹⁹⁴. In an internal or mixed armed conflict, these closely related criteria serve at a minimum only for the purpose of distinguishing an armed conflict from banditry, from unorganized and short-lived

¹⁹¹ Ibid.

¹⁹² Institute of International Law, The Application of International Law and Fundamental Human Rights in Armed Conflicts Involving Non-State Entities: Berlin Resolution of 25 August 1999, Paris, 2003, p. 30-31

¹⁹³ Ibid.

¹⁹⁴ ICTY, 7 May 1997, Prosecutor v. Dusko Tadic, Case No.: IT-94-1-A , op. cit., section 562.

insurrections or from terrorist activities, which are not covered by the international humanitarian law organization. The factors relevant to this determination are set out in the commentary to the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (Commentary, Geneva Convention I).¹⁹⁵ Clandestine terrorist groups do not resemble non-state entities that carry arms openly and dominate territories in state form armed forces and participate in more or less intensive military clashes in a non-international armed conflict. Terrorists today are suicidal, and this was the case on September 11, 2001. Terrorists do not always have weapons, in most cases they use explosives and they do not dominate the territories of a state.

3.5 Terrorist acts as war crimes

Terrorist acts can be qualified as war crimes which prohibited by the international humanitarian law¹⁹⁶. Terrorist aims to terrorize the civilian population but the *jus in bello* prohibits attacks on civilians¹⁹⁷ or acts of threat whose main purpose is to spread terror among the civilian population¹⁹⁸ and acts of terrorism perpetrated against civilians who are in the power of the enemy¹⁹⁹. Terrorist attacks can be committed by armed forces in conflict. They may take the form of criminal acts by a state agent or a member of a state armed force²⁰⁰. They may also be perpetrated by individuals on the sidelines of the conflict and be considered as a grave breaches in international humanitarian law²⁰¹.

In the following sections, this thesis will analyze the concept of "serious crimes" for crimes that have serious consequences for the victim in Geneva law such as acts of terrorism. Also this thesis will examine the criminalization of terrorism in the statutes and case law of international criminal jurisdictions in order to determine whether acts of terrorism can be characterized as war crimes.

¹⁹⁵ Ibid.

¹⁹⁶ Marco Sassoli and Antoine Bouvier, 2003, A right in the war? International Committee of the Red Cross (ICRC), Geneva, p. 118-119 .

¹⁹⁷ Art. 51 (2) of Protocol I and Art. 13 (2) of Protocol II

¹⁹⁸ Ibid.

¹⁹⁹ Section 2 of Protocol II which prohibits any act against any person who does not participate or more directly in hostilities.

²⁰⁰ Raffaele Maison and Charles Leben, 2004, the individual responsibility for state crime in public international law, Bruylant, Brussels, p. 145-147

²⁰¹ According to Ms Kalliopi K. Koufa: "When terrorist acts or threats of terrorist acts by non-State actors endanger the lives and safety of persons under the jurisdiction of a State, is the responsibility and duty of this state to protect these people. The state should at least enact criminal laws proscribing acts of terrorism (...) ". Cited in the Interim Report presented by Mrs. Kalliopi K. Koufa to the Economic and Social Council during the Fifty-third session of the Commission on Human Rights, on 27 June 2001, E / CN.4 / Sub.2 / 2001 / 31, p. 24, § 107.

3.5.1 The war crimes of terrorism against the civilian population

Acts of terrorism constitute serious violations of the rules applicable in armed conflicts. The facts of these serious violations, as pointed out by Eric David, are punishable regardless of the international or non-international nature of the conflict in which they were committed²⁰². This qualification is reserved for offenses that have serious consequences for the victim²⁰³.

3.5.1.1 Serious violations of humanitarian law

The International Law Commission has criminalized, in its Draft Code of Crimes against the Peace and Security of Humanity, war crimes of exceptional gravity²⁰⁴. It recalled that this offense is applicable in internal and international armed conflicts. . In its final report adopted in 1996, the ILC added war crimes to acts of terrorism²⁰⁵.

The specific provisions for these are contained first in the Convention IV on the Protection of Civilians and in the two Additional Protocols in times of international and non-international armed conflicts then in the case law and the statutes of the international criminal tribunals. But before analyzing the gravity of terrorist acts and their violations of *jus in bello*, we need to shed light on the notion of serious crime²⁰⁶.

In the case of international armed conflicts, the four Geneva Conventions of 1949 provide special protection to certain categories of persons including: members of the armed forces wounded on the ground, members of the sea forces and shipwrecked wounded, prisoners of war, and civilians in time of war, therefore violations of these rules constitute as a war crimes. Articles 50, 51, 130, and 147 respectively, of the four Geneva Conventions of 1949, treat certain acts as serious crimes and as war crimes when they are committed against civilians or property protected by the provisions of the above mentioned Conventions.²⁰⁷

These articles prohibit terrorist acts by classifying as serious crimes attacks against civilians causing great bodily harm. Article 33 of the Fourth 1949 Geneva Convention on the Protection of Civilian Persons in time of War provides that: "no protected person may be

²⁰² Eric David ,2008, Principles of the Law of Armed Conflict, Brussels, Bruylant, 4th ed., p578.

²⁰³ Ibid.

²⁰⁴ International Law Commission, Draft Code of Crimes against the Peace and Security of Humanity, UN Doc. A / CN.4 / 434 / Rev.1, Yearbook of the International Law Commission, 1996, vol. II, art. 20.

²⁰⁵ International Law Commission, Report of the Commission on the work of its forty-eighth session, UN Doc. A / 51/10, Yearbook of the International Law Commission, 26 July 1996, p. 135-143.

²⁰⁶ Eric David, 2008, Principles of the Law of Armed Conflict, Brussels, Bruylant, 4th ed., p102-103

²⁰⁷ The concept of war crimes includes the violations listed and defined as "grave breaches "in the Conventions and Protocol I [art. 11 S 4, 85 and 86], but they are not limited to these (...) . See Marco Sassoli and Antoine Bouvier, 2003, A right in the war? International Committee of the Red Cross (ICRC), Geneva, , p.303.

punished for an offense which he has not personally committed. Collective punishments, as well as any kind of intimidation or terrorism are prohibited ". The Additional Protocol to the Geneva Conventions on the Protection of Victims of International Armed Conflicts (Protocol I), extended the notion of grave breaches, *inter alia*, to a number of violations that were not included in the above-mentioned Conventions. The following acts are considered serious violations of the Protocol: "Art. 85, section 3, (a) subject the civilian population or civilians to attack; (b) launch an indiscriminate attack on the civilian population or civilian objects, with the knowledge that the attack will cause loss of life, injury to civilians or damage to civilian objects; e) submits a person to an attack knowing it out of action ". These two articles are only one form of terrorism perpetrated in the context of an international armed conflict and intimidation by belligerents against the civilian population. These attacks correspond to what could be termed "State terrorism" since they have come under the control of state officials and aim to terrify and terrorize civilians by violating Article 51 of Additional Protocol I, which provides for the following essential²⁰⁸; Section 2, neither the civilian population as such nor civilians shall be the object of attacks. Acts or threats of violence whose main purpose is to spread terror among the civilian population are prohibited. Section 4, indiscriminate attacks are prohibited. Section 5, among other things, the following types of attacks will be considered indiscriminate: (b) attacks that may be expected to cause incidental loss of life in the civilian population, injury to civilians, damage to civilian objects, or a combination of those losses and damages, which would be excessive in relation to the concrete and direct military advantage expected ". The "terror" referred to in this article corresponds to the "terrorism" attacks that are prohibited by this text in the context of international armed conflicts where civilians must be protected from acts of violence²⁰⁹.

²⁰⁸ Article 1 section 4 of this Protocol covers "armed conflicts in which peoples struggle against colonial domination and foreign occupation and against racist regimes in the exercise of the right of peoples to self-determination, protected in the Charter of the United Nations and in the declaration on the principles of international law concerning friendly relations and co-operation between States ". The ICJ, in its advisory opinion, on the legal consequences of the construction of a wall in the occupied Palestinian territory, had taken into account the fact that there is still "an international armed conflict and a Israeli occupation moreover, and it could have recalled the Parties to the conflict, especially the Israeli army, their obligations under international humanitarian law with regard to the protection enjoyed by "the civilian population" "in all circumstances". ICJ, 9 July 2004, *Consequence of the Construction of a Wall in the Occupied Palestinian Territory*, Reports 2004, Advisory Opinion No. 131, para. 162 and 110 112. Moreover, the ICJ, as pointed out by Juan Manuel Gomex-Robledo, "(...) has not contributed in this opinion to dispel the doubts that remain on the question of the definition of terrorism, which remains, unfortunately linked to that of the right of peoples to self-determination ", and thus affirmed that the construction of the wall in the occupied territory" constitutes a serious obstacle to the exercise by the Palestinian people of their right to freedom of self-determination and thereby violates Israel's obligation to respect that right. See Juan Manuel Gomex-Robledo, 2005, "The opinion of the ICJ on the legal consequences of building a wall in the occupied Palestinian territory: timid or cautious? ", RGDIP, no. 3, p. 521-537.

²⁰⁹ Ibid.

This prohibition of the war crime of terrorization during the conduct of hostilities concerns primarily the members of the State armed forces and falls fully within the scope of article 10 of the Draft Code of Crimes against the Peace and Security of the Mankind of the International Law Commission²¹⁰. According to the above mentioned there is no obstacle to the type of conducts in question being classified as a crime under international law. The question of whether one is dealing with a crime under domestic law or a crime under international law is important because the corresponding legal regimes are different and the distinction has significant consequences as regards the application of principle no. 2, which is the subject of article 12 of the above draft code²¹¹.

3.5.1.2. Serious consequences of acts of terrorism

With regard to non-international armed conflicts, the text of common article 3 of the four Geneva Conventions of 1949 also prohibits acts of terrorism without defining them. It focuses on "harm to life and bodily integrity, including murder in all its forms" 737 and requires the parties to the conflict to protect and treat those, who are not participating in hostilities or not in all circumstances, with humanity²¹².

The Second Additional Protocol of 10 June 1977 on the Protection of Victims non-international armed conflicts prohibits members of the armed forces from resorting to acts of violence (Article 13) whose main purpose is to spread terror among the civilian population²¹³. Serious offenses therefore include acts of terrorism against the civilian population. This prohibition is clear in the text of Article 4 section 2 of the Second Protocol, which prohibits each of the following acts when committed against persons not taking part in hostilities: "(a) harm to life the physical and mental health and well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation or any form of corporal punishment; b) collective punishment; (c) the taking of hostages; (d) acts of terrorism; (e) attacks on the dignity of the person, including humiliating and degrading treatment, rape, coercion of prostitution and any indecent assault ".

²¹⁰ CDI, 1996, Draft Code of Crimes against the Peace and Security of Humanity, CIDA, vol. 2, second part, p. 17-60.

²¹¹ Ibid.

²¹² Common article 3 paragraph. 1 provides that "persons who do not participate directly in hostilities, including members of the armed forces who have laid down their arms and persons who have been incapacitated by illness, injury, detention, or for any other reason, shall be in all circumstances, treated with humanity, without distinction ".

²¹³ Article 13, para. 1 of Additional Protocol II, entitled Protection of the civilian population, reads as follows: "1. The civilian population and civilians enjoy general protection against the dangers arising from military operations ".

We can see that Geneva's international humanitarian law does not provide a definition of terrorism, but it prohibits most acts that are commonly considered to be terrorist acts when they are committed during wartime. The two Protocols additional to the Geneva Conventions also proscribe acts tending to spread terror among the civilian population. Thus, acts committed for the purpose of terrorizing or killing the civilian population are certainly war crimes. These provisions are an essential element of the rules of international humanitarian law governing the conduct of hostilities that is to say the manner in which military operations is conducted. They prohibit acts of violence which during an armed conflict do not bring clear military advantages. It should be noted, however, that an attack against military objectives even if it is in accordance with the law can spread terror among civilians. The above mentioned provisions prohibit attacks specifically aimed at terrorizing civilians²¹⁴, for example bombing or sniping campaigns against civilians in urban areas. In the case of grave breaches or even war crimes, prosecutions may be brought against the perpetrators.

3.5.2 The intentional character of war crimes of terrorism in the jurisprudence and statutes of International Criminal Jurisdictions

With regard to the criminalization of acts of terrorism in the Statutes of the Courts the first important provision to be analyzed is Article 8 section 2-b of the Statute of the International Criminal Court (ICC) which criminalized indiscriminate terrorist attacks against the civilian population without, however, defining them. This implication appears to be reaffirmed by the international jurisprudence of the ad hoc criminal tribunals.

3.5.2.1. The criminalization of terrorism by the International Criminal Court

The second paragraph of the eighth article of the Statute of the ICC prohibits: “(iv) *to launch a deliberate attack knowing that it will incidentally cause loss of life and injury among the civilian population, civil damages; (v) Attacking or bombarding by whatever means, towns, villages, dwellings or buildings which are not defended and which are not military objectives; (vi) killing or wounding a combatant who has laid down his arms or has no further means of defence, (..)*”²¹⁵. Consequently “initiation a deliberate attack” was the subject of a comment by the ICC preparatory commission that did not require that the attack be followed to be deemed criminal. What matters it is the intention to specifically attack

²¹⁴ The UN Security Council has stated that “incitement to violence against civilians must be criminalized”. See Security Council, Resolution 1296, 19 April 2000, section 17.

²¹⁵ Rome Statute of the International Criminal Court.

civilians as such²¹⁶. This intentional nature of the destruction of a protected object is found in other serious offenses covered by the ICC Statute: including attacks on civilian property, against property or units of humanitarian assistance, against United Nations peacekeeping missions, against cultural property, against property and units protected by recognized protective signs²¹⁷. It should be noted that this article indirectly covers acts of terror committed with intent to intimidate the civilian population as well as ongoing military operations against the civilian population.

3.5.2.2 The criminalization of terrorism by ad hoc criminal tribunals

The jurisdiction of ad hoc tribunals is limited to the application of international law humanitarian. The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) does not provide for the offense of terrorism as a separate offense and only provides jurisdiction to try war crimes and crimes against humanity. The Statute of the International Criminal Tribunal for Rwanda (ICTR) expressly contemplates the jurisdiction of this Tribunal to try acts of terrorism. In this context, acts of terrorism are therefore acts of war tending to terrorize a civilian population or persons who do not participate directly in hostilities. These acts of terrorism thus constitute a violation of the principle that the civilian population must be safe from hostilities, a principle recognized as one of the fundamental principles of humanitarian law by the International Court of Justice (ICJ)²¹⁸.

As for the international jurisprudence of the ICTY, the two ad hoc criminal tribunals for the former Yugoslavia and Rwanda are aware of the war crime of terrorism but exclusively committed by regular combatants. The ICTY found in *Tadic*²¹⁹ that its statute applied to all serious violations of international humanitarian law. He stated in particular that: "(...) art. 3 is a general clause covering all violations of humanitarian law (...) ". The ICTY, as affirmed by its Trial Chamber²²⁰, has jurisdiction to punish attacks against the civilian population that violate not only article 51 of the first Protocol but also article 13 of the Second Protocol and especially common article 3 of the four Geneva Conventions of 1949. The above mentioned

²¹⁶ Doc. UN PCNICC / 2000/1 / Add.2, 1 November 2000, p. 25.

²¹⁷ See Article 8, para. 2 of the ICC Statute. See also "Report of the Secretary-General on the situation in Rwanda", Doc. Security Council, S / 1994/640, 31 May 1994, p. 11, para. 5.

²¹⁸ ICJ, Advisory Opinion, 8 July 1996, Legality of the Threat or Use of Nuclear Weapons, Rec. ICJ 1996, para. 78, p. 257.

²¹⁹ ICTY, 2 October 1995, Prosecutor v. Dusko Tadic, Judgment No. IT-94-1, op. cit., p. 51, para. 89 and p. 73, para. 134-136.

²²⁰ ICTY, 12 June 2007, The Prosecutor v. Milan Martić, aff. IT-95-11-T.

Chamber²²¹, in the judgment of 5 December 2005 clarified the constituent elements of the terrorist attack against civilians: "the offense of attacking civilians includes the following elements: offenses falling under Article 3 of the Statute and the following specific elements:

1. Acts of violence engaged against the civilian population or civilians not directly participating in hostilities and resulting in death or causing serious injury to physical integrity or health.
2. The perpetrator of these acts of violence has intentionally subjected them to the civilian population or civilian persons not directly participating in the hostilities.

The notion of "intention" includes that of special fraud but not that of recklessness. Whoever attacks civilians voluntarily in complete indifference to the consequences of his actions is deemed to act "intentionally". In order to establish culpable intent in a terrorist attack against civilians, the Prosecution must prove that the person responsible knew that the attackers were civilians. Trial Chamber I of the ICTY characterized the crime of terrorism and the threats of violence and acts of terror of the civilian population as "a very serious violation of a fundamental rule of international humanitarian law". The main purpose of which is to terrorize civilians, is therefore the intentional element of the crime of terror that is characterized by the specific intent of the perpetrator and he is aware of the terror could result. "Terror" is defined by the ICTY Appeals Chamber as "extreme fear"²²². In the Blaskic case, the ICTY Trial Chamber observed with regard to the material element of the offense that "the attack must have caused death and / or serious bodily harm to the population or civil property or damage to civilian objects (...)"²²³. It concluded that "in such an attack must have been undertaken intentionally with the knowledge that civilians or civilian objects were targeted without military necessity"²²⁴. In the Dario Kordic case, the Trial Chamber²²⁵ stated that "proscribed attacks are those which intentionally target civilians or civilian targets in the course of an armed conflict and that military necessity does not justify. They must have caused civilian casualties and / or seriously damaged their physical integrity and caused massive damage to civilian property. The ICTY Trial Chamber²²⁶ concluded that the terrorist offense of attacking civilians includes elements common to offenses under Article 3 of the Statute, as well as the following specific elements: (1) acts of violence engaged against

²²¹ ICTY, 30 November 2006, The Prosecutor v. Stanislav Galic, aff. No. IT-98-29-A, para. 63-98.

²²² ICTY Prosecutor's Initial Indictment against Stanislav Galic, Case No. IT-98-29-I.

²²³ ICTY, 29 July 2004, The Prosecutor v. Tihomir Blaskic, aff. IT-95-14-A, judgment of 29 July 2004.

²²⁴ Ibid.

²²⁵ ICTY, 21 February 2001, The Prosecutor v. Dario Kordic and Mario ^ Erkez, IT-95-14 / 2-T, Judgment of 26 February 2001, para. 328.

²²⁶ Ibid.

civilians²²⁷ not participating directly in hostilities and resulting in death or causing serious injury to body or health; (2) the perpetrator of these acts of violence intentionally subjected them to the civilian population or civilians not directly participating in the hostilities.

3.6 The issue of the qualification of acts perpetrated by National Liberation Movements and the position of the Arab States

The United Nations has been confronted for several years with the problem of the distinction between terrorism and national liberation struggles. This major obstacle prevents the international organization from developing a global and unanimous definition of terrorism, which is generally accepted by member States and in accordance with international law. The Arab States, in particular those belonging to the Organization of the Islamic Conference, the League of Arab States, and the African Union, defend the hypothesis that national liberation struggles against foreign occupation expressing the right of peoples to self-determination must be excluded from the general definition of terrorism in the Autonomous Convention on Terrorism to be prepared by the Special Committee on Terrorism. This position of the countries of the South is met with a refusal on the part of the Western States which reject the blending of the causes of terrorism and the terrorist acts that are condemned despite their origins or their authors. The opposition of these views has been expressed in the UN General Assembly since the 1970s. The UN Secretary-General's Report on "Human Rights and Terrorism"²²⁸, together with the work of the Sixth Committee²²⁹ of the Legal Commission, reflected these different views among Member States on the issue of human rights and exception of the national liberation struggles of the future general definition of terrorism. According to the Report of the Secretary-General to the General Assembly the Egyptian Government, among other Arab governments, intended to distinguish between terrorism and armed struggle against colonial or other foreign domination as a legitimate right to self-determination, while asserting that religion could not be used to justify terrorism. The Legal Committee of the General Assembly adopted without a vote a draft resolution on measures to eliminate international terrorism. Under the terms of the draft, the General Assembly decided

²²⁷ ICRC President Jakob Kellenberger said in interview by Andreas Bucher was first published in 21-07-2005 Article, Facts "Being hard on yourself" on the website of the Red Cross that: "The events that occurred in Iraq (...) constantly remind us that the essential dignity of human beings is often one of the first victims of war. (...) The shocking events concerning the detainees at Abu Ghraib prison in Iraq are unfortunately only one more example of non-compliance with these rules of law and the values they represent.

²²⁸ Report of the Secretary-General of the United Nations, "Human Rights and Terrorism", A / 54/439, 6 October 1999, para.5. See also Resolution 52/133, General Assembly, 12 December 1997.

²²⁹ The Sixth Committee proposes that efforts to finalize a comprehensive convention on terrorism continue in 2002", Press Release, AG / J / 368, UN Doc. UN, 21 November 2000.

that its Special Committee on Terrorism could urgently pursue the elaboration of a comprehensive convention on international terrorism. It should seek to resolve the issues raised by the expansion of a draft international convention for the suppression of acts of nuclear terrorism and keep on its agenda the question of convening under the auspices of the United Nations a high-level conference to define a common response by the international community to terrorism in all its forms and manifestations. In the Sixth Committee, delegations explained their position on the draft resolution. The representatives of the Syrian Arab Republic and Lebanon argued that it was important to make a clear distinction between terrorism and the legitimate struggle of peoples against foreign occupation, believing that State terrorism and foreign occupation were more outrageous forms of terrorism. The Israeli delegate, however, considered that these delegations disguised constant support to certain terrorist groups to hide the isolation of their countries in the current unity of the international community to fight against terrorism. The Syrian representative, for his part, argued that the Palestinians' resistance is legitimate and that what must be denounced are rather the acts of repression committed by the Israeli forces. It thus seemed necessary to explain, at first, the position of the Arab states of the question of the exception of the struggle of peoples against occupation in the face of the Western position, which does not make such a distinction. Secondly, we will analyze the definitions of the national liberation movements, the right of self-determination, the definition of the struggle against occupation and the constitutive texts of the right of self-determination. We will thus be able to better understand in which hypotheses these texts find application, and better understand the extent of the rules of international law imposed on the military occupier.

3.7 The position of the Arab states in the struggle of peoples for self-determination in the face of the position of the West

While the end of 2005 had been set as the deadline for the adoption of a comprehensive convention on terrorism, however, the debates in the Sixth Committee²³⁰ of the General Assembly in charge of its negotiation have reappeared the differences on the distinction between terrorism and the struggle for self-determination. Reiterating its traditional position

²³⁰ See Press Release AG / J / 339, 15 November 2000. The representative of the United Kingdom, Llewellyn Huw, on behalf of the European Union stated in the Sixth Committee: "The conclusion of a comprehensive convention on international terrorism is a major element of the Secretary-General's proposed global strategy against terrorism (...). Its finalization during the 60th session of the General Assembly is a prerequisite for the convening of a high-level conference to define a joint response to terrorism and the review of the counter-terrorism strategy".

the representative of Yemen, speaking on behalf of the Organization of the Islamic Conference, condemned terrorism in all its forms and manifestations but he said that "the struggle of peoples against occupation foreign policy and for self-determination should be differentiated from terrorism"²³¹. A position also supported by the representative of Cuba, for whom a general convention on international terrorism must make a clear distinction between terrorism and the legitimate struggle of peoples for independence and self-determination. On this point, he was joined by the representative of Egypt who considered it essential to settle the political discussions which are at the origin of feelings of hopelessness, such as the conflict over the questions of the occupation of the territories by the force and denial of the right to self-determination. This comprehensive approach of the Arab states raises once again the question of the definition of terrorism, which the international community has so far been unable to resolve. However, in the absence of such a broad and generally acceptable definition all UN counter-terrorism works risks being paralyzed and faced with the internationalization of terrorism, cooperation and international solidarity become crucial. This situation also requires a global response through concrete actions commensurate with the commitments made. Western states refuse to distinguish between the use of acts of violence by national liberation movements and terrorism. The European Council²³² considers terrorism to be an ideology and a threat to public security. It adopted a framework decision which encourages inter alia and member States to approximate their laws and establishes minimum rules for terrorist offenses. After defining these terrorist offenses, this framework decision defined terrorist acts as "acts ... committed with the intention of threatening the population or seriously damaging or destroying the political, economic or social structures of the country including murder, bodily injury, hostage-taking, blackmail, weapons-making, commission of attacks, threat to carry out the aforementioned behaviours, etc"²³³. These offenses may be committed by one or more individuals against one or more countries. It is noted that in this European definition there is no distinction between terrorism and the national liberation struggle because for the European States the terrorist acts are rather methods and behaviours of violence whose intention is to terrorize the civil population despite the causes and objectives of the attacks.

The questions that arise here; is it necessary to distinguish between terrorism, condemnable in all its manifestations and in all its forms, whatever the perpetrators, of the struggle of peoples

²³¹ Ibid.

²³² Council Framework Decision 2002/475 / JHA of 13 June 2002 on the fight against terrorism, op. cit.

²³³ Ibid.

against oppression and for self-determination? Is the use of violence by anti-occupation movements a form of terrorism? In other words, are the national liberation movement's terrorist movements? Is there not a legal distinction between the two concepts in public international law and in international humanitarian law? In order to answer these questions, we will first analyze the positions of the Arab League, the Organization of the Islamic Conference and the African Union on the issue of the exception of the national liberation movements. In the second step, we will analyze the Western position refusing any distinction between acts of violence committed for national struggle movements and acts of terrorism.

3.7.1 The Arab distinction between terrorist acts and the struggle for national liberation

The legal argument between Western and Arab states has not been reduced since the 1960s and the difficulty remains up to present. The statements of some representatives before the United Nations General Assembly, including in the days following the attacks of 11 September 2001, demonstrate the Arab states, especially the Asian and Middle Eastern states, distinguish between terrorism and national liberation struggle. The United States accuse some countries, such as Cuba, Iran, North Korea, Libya, Sudan and Syria to support terrorism and to obstruct the efforts of the United States and the international community to combat terrorism, as stated in the "Report on Terrorism in the World"²³⁴.

The representative of Qatar at the United Nations, among other representatives of the Arab States, rejected these accusations at the seventh and eighth meetings of the Sixth Committee of the General Assembly held on 17 October 2003, and called for mobilizing international efforts against terrorism under the support of the United Nations. He stated that "a unified definition of all forms of terrorism must be developed. It must make a clear distinction between terrorism and resistance to foreign occupation "²³⁵. The Qatar representative thus emphasized the priority of the international community to resolve the causes of international terrorism, such as the Israeli occupation of the Arab territories²³⁶, the problems of poverty,

²³⁴ "World Terrorism Report," US Department of State Document, April 27, 2004.

²³⁵ Press Release, AG / J / 398, 17 October 2003. In view of the gravity of the threat of terrorism, delegations in the Sixth Committee call for increased cooperation and assistance.

²³⁶ See "Israel Separation Wall Meeting: Speakers Discuss the Impact of the Wall on Palestinians and Peace in the Region," UN Press Release AG / PAL / 952, April 16, 2004. "The International Meeting on the Implications of Wall Construction in the Occupied Palestinian Territory, including in and around East Jerusalem, held in Geneva on 15 and 16 April 2004, heard a message from the Chairman of the Ad Hoc Committee to investigate Israeli practices affecting the human rights of the Palestinian people and other Arabs of the occupied territories. The Chairman of the Special Committee stated that the wall hampers the daily life of the entire Palestinian population while weighing on its future. It asserts that its construction violates essential provisions of international humanitarian law and jeopardizes the entire peace process initiated by the road map and supposed to lead to the peaceful coexistence of two neighbouring states. In particular, experts in international law have pointed out that the construction of this wall is illegal, and that the concept of self-defence can not apply to the

extremism and gender inequality. While Qatar stated that rejects all forms of terrorism , Malaysia on behalf of the member countries of the Organization of the Islamic Conference²³⁷, has also established in the United Nations General Assembly a distinction between the struggle of peoples against foreign occupation on the one hand, and terrorism on the other .Also for the representative of Iran, such a distinction is absolutely essential, he said "what happens in the Middle East shows that the indigenous population of Palestine struggling to free their territory from suppression by forces to use all means of repression at their elimination does not commit an act of terrorism but is fighting a liberation struggle ". This distinction was also defended by Syria and the Democratic Republic of the Congo. According to the representative of the Democratic Republic of the Congo, "a future general convention on terrorism must clearly distinguish between terrorist acts and acts of national liberation". "We would give a blank check to countries - Uganda, Rwanda and Burundi - which, for more than two years, have engaged in a real state terrorism on the territory of the DRC by committing atrocities," he said and affirmed. This distinction was absolutely contested by the Israeli representative. This comprehensive approach raises once again the question of the definition of terrorism, which the international community has so far been unable to resolve²³⁸.

3.7.1.1. The Arab position of the causes of terrorism in the face of the Israeli vision

The League of Arab States rejects international terrorism, represses its dimension, its ramifications and encourages Arab governments to prohibit the training centres of armed groups on their territories and refuses to label the Palestinian national liberation movements as terrorists. The Israeli army, meanwhile, continues its military actions against the Palestinian groups, while describing as terrorism the acts committed by the latter, while aiming at limiting the armed attacks. Each current terrorism is presented by perpetrates as a resistance movement against another terrorism or against a tyranny (often they use the term of state terrorism). The action of a government, based on the use of force, against its national opponents or against the civilian population and public infrastructures, is sometimes considered by its rulers as a fight against terrorism. The deliberate attacks carried out by Israeli forces in the Gaza Strip were made in the absence of a counter-terrorist struggle against the Palestinian Hamas movement after taking office. They targeted infrastructure, the civilian population and civilian property in the Gaza Strip in ways that Amnesty International

construction of the wall. It has been estimated that the wall represents a collective punishment aimed at pushing the Palestinians to leave their territory, in order to better implant Israeli settlements.

²³⁷ Press Release AG / J / 339, Doc. UN, 15 November 2000, op. cit.

²³⁸ Ibid.

characterized as violations of international humanitarian law and war crimes.²³⁹ For this reason, several authors²⁴⁰ have argued that legitimate resistance against occupation and illegitimate terrorist act should not be confused and that it is necessary to rely on the following two criteria; the legitimacy of the ends and the legitimacy of the means. In order to distinguish between these two phenomena, according to Passet and Liberman the legitimacy of ends lies in the right of the people to self-determination and their right to defend a future state. The legitimacy of the means can be seen in the action of a resistance against a military occupier and his armed forces, as pointed out by these two authors. In this respect, resistance to the Nazi occupation in France was considered by the Europeans as a struggle for freedom, but the Reich described it as terrorism. During the Cold War, the United States supported the resistance of fighters in Afghanistan, calling them "resistant"²⁴¹. In recent times, the Israeli army declared on July 12, 2006 an offensive against Lebanon following the abduction of two Israeli soldiers by the Lebanese Hezbollah. While Israeli Deputy Prime Minister Shimon Peres has stated that it is an Israeli military counterterrorism offensive, the European Union²⁴² has described Israel's military intervention as disproportionate²⁴³.

The Arab States defend the right of the occupied peoples to self-determination and reject all forms of terrorism.²⁴⁴ On the basis of General Assembly resolution 52/113 (1997)²⁴⁵ entitled universal realization of the right of peoples to self-determination, for example, Lebanon in a

²³⁹ See Amnesty International Press Release "Israel and the Occupied Territories. Deliberate attacks are war crimes," MDE 15/061/2006, Bulletin No. 169, June 30, 2006. In this report, Amnesty International has stated that: "The deliberate destruction of the only power plant in the Gaza Strip, drinking water systems, bridges, roads and other infrastructure is in violation of the Fourth Geneva Convention and will have significant long-term humanitarian consequences for the 1.5 million inhabitants of the Gaza Strip. Gaza strip. Nearly half of Gaza's inhabitants are now without electricity, and water has been cut off in many areas due to lack of electricity, which is needed to run the water pumps used to extract and deliver the water and because of the lack of electricity. destruction of pipes after the bombing of bridges and roads. The heavy damage caused by Israeli artillery and air raids against these infrastructures in recent days is estimated at several million US dollars; months of work will be required for their rehabilitation. If alternative emergency measures are not put in place quickly to restore electricity and water supply, the consequences could be catastrophic for the Palestinian population."

²⁴⁰ Rene Passet and Jean Liberman, 2002, Financial globalization and terrorism, has the deal changed since September 11? Paris, p. 18-26.

²⁴¹ Olivier Roy, 1987, "Afghan resistance: the paths of legitimacy", International Policy, no 34, p. 119-127.

²⁴² European Commission, Bulletin of the European Union, No. 3, 2006, p. 116.

²⁴³ European Commission, Bulletin of the European Union, No. 11, 2006, p. 130.

²⁴⁴ See the Report of the United Nations Secretary-General entitled "Right of peoples to self-determination", adopted during the fifty-fifth session of the General Assembly, A / 55/176 / Add.1, 14 September 2000.

²⁴⁵ UN General Assembly Resolution 52/113, adopted on 12 December 1997. In its Order No. 141, the ICJ decided that "in view of the fact that the unilateral declaration of independence of the Provisional Institutions of Autonomous Administration of Kosovo of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, the authors of the above-mentioned declaration are deemed to be able to provide information on the matter; and (...) (...) submit to the Court written contributions, (...) ". See ICJ Ordinance No. 141 "Compliance with International Law of the Unilateral Declaration of Independence of the Provisional Institutions of Self-Government of Kosovo", 21 October 2008.

letter²⁴⁶ dated 7 June 2000 to the Secretary-General of the United Nations, strongly condemned attempts by Israel or others to bring Palestinian refugees to its territory. Lebanon endorses General Assembly resolutions 194 (III) and 54/152 and insists on the right of Palestinians to return to their homeland and to create an independent Palestinian state. The issue of Palestinian refugees in Lebanon is a very sensitive issue. The Lebanese government refuses to grant them Lebanese nationality, while insisting on the right of return of these refugees to Palestine. On 10 July 2000, the Libyan Arab Jamahiriya ratified General Assembly resolution 54/155, while also supporting the right of peoples to self-determination in the sense that this right is indispensable to guarantee and uphold fundamental rights.²⁴⁷ The Libyan Arab Jamahiriya also approved the legitimate struggle of peoples for freedom and independence, including the use of armed struggle. The League of Arab States therefore supports the right of Palestinians to self-determination and the establishment of an independent state in Palestine. In addition, the Arab states defend the right of peoples to control their natural resources and to choose the system best suited to their situation²⁴⁸.

3.7.1.2. The Arab distinction between terrorism and the struggle for national liberation

During the discussions of the Sixth Committee of the UN General Assembly, the Arab delegations emphasized their point of view by confirming the necessary distinction between terrorism and the struggle for the liberation of the occupied territories. For Arab representatives, terrorism feeds on injustice and inequality at the national and international levels²⁴⁹.

Therefore, they stressed that it is important to tackle its underlying causes by fighting poverty and promoting development in societies where unemployed youth are easy target for terrorist networks²⁵⁰. The United Nations remains in the most appropriate framework to coordinate this collective action. That is why the United Nations adopted a Global Counter-Terrorism Strategy in September 2006 to promote greater mobilization of Member States to establish counter-terrorism legal cooperation²⁵¹. The representative of Qatar ²⁵² reaffirmed that the

²⁴⁶ See the Report of the Secretary-General entitled "The right of peoples to self-determination", adopted during the fifty-fifth session of the General Assembly, A / 55/176 / Add.1, 14 September 2000.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ See the Sixth Committee proposes that efforts to finalize a comprehensive convention on terrorism continue in 2002, Press Release, AG / J / 368, UN Doc. UN, 21 November 2000.

²⁵⁰ Ibid.

²⁵¹ See The United Nations Global Counter-Terrorism Strategy, 8 September 2006.

commitment of her country to fight against terrorism and stressing that terrorism benefited from various funding. She hoped that the Special Committee would finalize the draft of a general convention and hoped a distinction would be made between the right of peoples to self-determination and terrorism²⁵³. On the international front, as a member of the Security Council, Qatar has unequivocally and neutrally supported all Security Council resolutions in this area. There should be no confusion between terrorism and belonging to a religion or culture²⁵⁴. The Arab countries therefore condemn all forms of attacks whatever they may be but they refuse to describe as terrorism the acts of national liberation movements struggling to establish an independent state. While reaffirming their commitment to the right of peoples to self-determination, the Arab countries link this right to the notions of unity and territorial integrity of a State. In the Arab League's "Doha Declaration"²⁵⁵, at the Arab leaders' Summit held in Qatar on March 30-31, 2009, member states reaffirmed their support for the Palestinian people's resistance to Gaza. They described the Israeli offensive as armed aggression and the Israeli army's acts of war crimes and violations of international law and humanitarian law²⁵⁶. They denounced the Israeli occupation of the Lebanese, Palestinian and Syrian Golan territories. But at the same time, the Arab states have rejected any form of terrorism, stressing the importance of resolving the causes that stimulate terrorism. This clear distinction between terrorism and the actions of national liberation movements is due to the fact that terrorists do not defend any homeland and never seek to found a state. For this reason, they have affirmed in several Arab summits that all measures aimed at combating terrorism must be applied in accordance with the principles of the United Nations Charter and within a legal framework that controls the actions of States. It is in this context that the League of Arab States supports the efforts of the United Nations to rapidly finalize the draft of general convention on International Terrorism based on a clear legal definition of terrorism accepted by all. Yemen's representative to the Sixth Committee stressed that his country is in favour of promoting dialogue among civilizations, as well as establishing an international counter-terrorism centre in one of the Gulf countries. The definition of terrorism, he recalled, must establish a distinction between terrorism and the right of peoples to self-determination.

²⁵² See statement by Alya Ahmed Al-Thani quoted in General Assembly document AG / 10654 "The Assembly calls on Afghanistan to strengthen its fight against terrorism, impunity, corruption and Drug Trafficking ", adopted on 5 November 2007.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ "Doha Declaration" of the Arab Summit held in Qatar on March 30 and 31, 2009.

²⁵⁶ Ibid.

3.7.2 The Western refusal of any distinction between the terrorist acts of the liberation movements and international terrorism

The European Union, for its part, stresses that "terrorism is the result of violent radicalisations and extremism"²⁵⁷. Since the attacks in Madrid and London, it has developed a new long-term European strategy to combat the factors that contribute to violent radicalization²⁵⁸. Regarding the Middle East crises, if the European Union qualifies the Palestinian movement Hamas, for example, as a terrorist organization in one hand but in the other hand it has indirectly recognized Hamas leader in Gaza, Ismail Haniyeh, as a prime minister elected by the Palestinian people. Indeed, in the report of the Directorate-General for Humanitarian Aid of the European Union²⁵⁹, entitled humanitarian aid to the most vulnerable populations in the ongoing crisis in the West Bank and Gaza Strip and to Palestinian refugees from Lebanon. The European Commission has made it clear that it has granted humanitarian aid to Palestinian refugees in the Gaza Strip after the Palestinian Prime Minister Ismail Haniyeh's office was formed²⁶⁰. The questions here are why does the European Union refer to Hamas as a terrorist movement and at the same time continue to recognize its leader as a prime minister? Does it qualify all Hamas institutions as terrorists, or only its military organ? Why does the European Commission finance Palestinian institutions in Gaza if Hamas is still on the European list of terrorist groups?

In the aforementioned report the European Commission noted that; following the success of Hamas in the Palestinian Legislative Council (PLC) elections, the Israeli government has suspended the monthly transfer of the revenue it collects on behalf of the Palestinian Authority (PA). (...) The successive closures since the beginning of 2006 have increased food shortages and caused prices to rise, which has a significant impact on vulnerable populations²⁶¹. These European contradictions concerning the qualification of Hamas require an analysis of the European position of the national liberation movements and terrorist groups.

²⁵⁷ On 30 November 2005, the Council of the European Union drew up the European Union's strategy to combat terrorism. See 14469/4/05 REV of the Council of the EU, Brussels, 30 November 2005, p 17.

²⁵⁸ Ibid.

²⁵⁹ European Commission, Directorate-General for Humanitarian Aid-ECHO, 2006. "Decision granting humanitarian aid", Budget line 23 02 01, Decision No. : ECHO / -ME / BUD / 2006/01000, Brussels , , p 24

²⁶⁰ Ibid.

²⁶¹ Ibid.

3.7.2.1. The European Union and the lists of terrorist organizations

The European Union adopted a common position on 27 December 2001 concerning the application of specific measures to combat terrorism²⁶². This position is intended to implement additional measures pursuant to United Nations Security Council Resolution 1373 (2001). In particular, it establishes a list of persons, groups and entities involved in terrorist acts to whom the measure of the freezing of funds and other financial assets or economic resources should be applied in the fight against the financing of terrorism²⁶³. According to these position persons, groups and entities involved in acts of terrorism means those who are proven on the basis of specific information which they have already committed, are attempting to commit or facilitate the preparation of acts terrorists. These are intentional acts that harm the life, physical integrity, property and safety of the people. The list in the annex to the Common Position of the European Union is composed on the basis of investigations carried out by the competent judicial or police authorities of the Member States of the European Union and may be completed and reviewed every six months²⁶⁴. It contains the names of entities such as ETA (Basque Country and Freedom), IRA (Irish Republican Army), GRAPO (anti-fascist resistance group of October 1st), the terrorist wing of Hamas, and others activist revolutionary groups, as well as the names of the people in it. This list was completed on 17 June 2002 by Common Position 2002/462 / PESC²⁶⁵. These European lists of organizations were made on the basis of the European definitions of terrorist offenses set out in Council Framework Decision 2002/475 / JHA of 13 June 2002 on the fight against terrorism²⁶⁶. It applies to behaviours that can lead to terrorist acts. Article 3 of this European Framework Decision defines terrorist offenses as offenses "designed to seriously undermine or destroy the political, economic or social structures of a country by causing disruption or interruption of supply in water, electricity, or any other basic resource "²⁶⁷. The main purpose of these lists of terrorist groups is to promote a common European anti-terrorist action. Indeed, the international events of 11 September 2001, 11 March 2004 and the London attacks in 2005 have led the EU to integrate the fight against terrorism into its fields of action.

²⁶² Council of the EU Common Position of 27 December 2001 on the application of specific measures to combat terrorism, OJ L 344 of 28 December 2001, p. 93-96.

²⁶³ See the Common Position of the European Union entitled "Freezing assets: list of terrorist groups and individuals", 14 August 2007. See also the list of terrorists established by the EU, Council of the EU, Brussels 29 June 2009, Doc. 11309/07, p 3.

²⁶⁴ Ibid.

²⁶⁵ Common Position 2002/462 / CFSP of 17 June 2002, OJ L 160, 18.06.2002, p.32.

²⁶⁶ Council Framework Decision of 13 June 2002 on the fight against terrorism, OJ L 164, 22.6.2002, p. 3-7.

²⁶⁷ Ibid.

The EU does not distinguish between terrorist acts perpetrated by terrorist groups and acts of terrorism perpetrated by armed movements even if they seek to liberate occupied territories as long as these movements attack civilians by putting their lives, their physical integrity and their property in danger. For example Hamas, even though it has social activities but its military wing is labelled as terrorist by the EU. That is why European cooperation with the Palestinian Authority has excluded Hamas. Indeed, in the framework of the Action Plan for the Middle East Peace Process decided by the Council, a European Coordinating Office for Palestinian Police Assistance was established in January 2005. The office prepares and accompanies the Palestinian Authority in the definition of its plan of reform of the security services. At the same time, the EU has repeatedly denounced armed Israeli offensives in the Gaza Strip and in Lebanon against the civilian population. This European position on acts of terrorism refers to Article 54 of the 1977 Additional Protocol I to the Geneva Conventions, which states: "It is forbidden to use starvation as a method of war against civilians (...). It is forbidden to attack, destroy, remove or put out of use the goods indispensable for the survival of the civilian population"²⁶⁸. The implications of the above mentioned Article 54 are clear that the bombing of power plants in Gaza by the Israeli army, the blockade of civilian populations and collective punishment against them is a war crime²⁶⁹.

3.8 International Law and the Right to Self-determination

Since the collapse of the Soviet Union, active movements claiming the right to free self-determination in more than sixty countries of the world as noted by Theodore Christakis²⁷⁰. According to this author, the Armenians of Nagorno-Karabakh want their attachment to Armenia. In Georgia, Abkhazia and South Ossetia declared their independence before facing the Georgian tanks. In 1995, the ICJ confirmed the right of peoples to self-determination²⁷¹. In the East Timor case, the Court noted that; the principle of the right of peoples to self-determination has been recognized by the United Nations Charter and in the case-law of the Court. This is one of the essential principles of contemporary international law. Thus, the International Law Commission noted in its report on the law of treaties that the forcible maintenance of colonial domination constitutes an international crime.

²⁶⁸ See protection of objects indispensable to the survival of the civilian population, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

²⁶⁹ Ibid.

²⁷⁰ Theodore Christakis, 1999, The right to self-determination outside situations of decolonization, Paris, p.15-16.

²⁷¹ ICJ, 30 June 1995, Case concerning East Timor (Portugal v. Australia), Rec. ICJ, 1995, p. 102, para. 29.

3.8.1 The Right to Self-determination, an essential principle of International Law

The United Nations in its Declaration and Program of Action of Vienna adopted on 25 June 1993, recognized and reconfirmed the right of self-determination of peoples subject to colonial domination or foreign occupation. Theodore Christakis stated that "since the resolution of the General Assembly 2649 (XXV) of November 30, 1970, and until today, the UN affirms the right of the Palestinian people to self-determination²⁷². Thus, Hans Kelsen²⁷³, explains that Article 1 section 2 of the Charter affirms not only the right of peoples to self-determination but their rights to have a sovereign, independent State free from any form of domination, occupation or colonization²⁷⁴.

3.8.1.1. The Right of peoples to Self-determination

The practice of the United Nations has recognized in various resolutions the right of self-determination for peoples under military occupation²⁷⁵. Resolution ES-6/2 of 14 January 1980, resolution 35/37 of 20 November 1980, resolution 44/15 of 1 November 1989 and 45/12 of 7 November 1990, all these UN resolutions describe as an absolute the right of all peoples to decide their own form of government without interference, subversion, coercion or coercion from outside. Theodore Christakis concluded that "the right to self-determination of peoples under colonial domination or foreign occupation therefore constitutes a well-established principle of *jus gentium*"²⁷⁶. Part of the doctrine has emphasized that the principle of self-determination also applies in cases of foreign occupation and domination²⁷⁷. Resolution 1514 of 14 December 1960 referred to "non-trusteeship territories", "Non-Self-Governing Territories" and "Other Territories" which "have not yet attained independence"²⁷⁸. In these cases, this resolution affirms that the national liberation movements exercise the right to self-determination. On the contrary, it is remarkable that on the one hand, transnational terrorist groups do not defend any occupied territory or exercise any right to the independence of a state, and do not fight against colonial domination. Rather,

²⁷² Theodore Christakis, 1999. The right to self-determination outside situations of decolonization, op. cit., p. 29. See also resolution 2535 / B (XXIV) of 10 December 1969 and resolution 2672 / C (XXV) of 8 December 1970.

²⁷³ Hans Kelsen, 2000. the Law of the United Nations. A Critical Analysis of Its Fundamental Problems, the law book exchange, New Jersey, p. 51.

²⁷⁴ Ibid.

²⁷⁵ Sylvain Vite, 2008, The interrelation of the law of occupation and economic, social and cultural rights: the examples of food, health and property, Volume 90 Number 871.

²⁷⁶ Ibid.

²⁷⁷ Ian Broenlie, 1995, International Law at the Fifth Anniversary of the United Nations: General Course on Public International Law, RCADI, Volume 255, p. 61.

²⁷⁸ Ibid.

they are attacking state armies to overthrow existing governments, such as the Taliban in Pakistan, who have rallied to al Qaeda members after fleeing Afghanistan since the US offensive in 2002. In fact, in April 2009, these groups dominated several Pakistani cities and forcing the Pakistani army to intervene and repress them militarily during the month of May. On the other hand, these terrorist groups act only clandestinely to achieve political and financial objectives. They kill people without any distinction between civilians, including children, and belligerents, such as ISIS in Iraq and Syria.

3.8.1.2. The Right to an independent state

The General Assembly resolution 38/130 (1983) made a clear distinction between terrorism and national liberation movements²⁷⁹. This is by affirming that the continuing acts of international terrorism result in innocent human lives , reconfirming the absolute right to self-determination of peoples subject to colonial regimes as well as to others forms of foreign domination . Also in defending the legitimacy of their struggle, especially the struggle of the national liberation movements, the UN General Assembly recommended to all member states to cooperate with one another in order to share information about terrorist groups and to suppress acts of international terrorism. The above resolution listed three different cases for the exercise of the right of peoples to self-determination: (a) when a non-self-governing territory is subject to colonial rule; (b) when a people are subject to a racist regime; c) or when it is dominated by foreign occupation. Similarly, the resolution 34/145 (1979)²⁸⁰ has already made this distinction between terrorist groups and national liberation movements. It also recalled the right to self-determination of the struggle against the occupation and foreign domination. And it reconfirmed their legitimate right to self-determination and independence and other human rights and fundamental freedoms.

Terrorists only seek to establish a criminal mission. They carry out criminal activities by killings, assassinations, attacks and other threats to peace and international security. However, the national liberation movements, on the other hand, seek to found an independent state recognized by the United Nations. In 1981, the principle of self-determination was reaffirmed once again within the United Nations. In adopting resolution 36/109 (1981), the General Assembly denounced all acts of terrorism and distinguished them from the actions of

²⁷⁹ General Assembly resolution 38/130 (1983), adopted on 19 December 1983, Doc. A / 38/130.

²⁸⁰ General Assembly resolution 34/145, adopted on 17 December 1979, Doc. A / 34/145.

the national liberation movements against occupation in accordance with the purposes and principles of the Charter and the Convention²⁸¹.

The UN General Assembly adopted the UN Declaration, the United Nations Charter, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the United Nations Declaration and Program on the Rights of Indigenous Peoples²⁸², which reaffirmed Vienna Action of the fundamental significance of the right of all peoples to self-determination by virtue of which they freely decide their political status and freely practise their economic, social and cultural development²⁸³. The General Assembly distinguished between national liberation movements and terrorist groups engaged in activities contrary to international law. In article 46 stated that "nothing in this Declaration may be interpreted as implying for any State, people, group or individual any right to engage in any activity or to perform any act to the contrary to the United Nations Charter, nor to authorize or encourage any act which has the effect of destroying or diminishing, wholly or in part, the territorial integrity or political unity of a sovereign and independent State"²⁸⁴. According to this resolution, even though national liberation movements have the right to liberate their territories from occupation and foreign domination, their actions must be in accordance with the UN Charters and international law. The occupying States must also apply the legal provisions of the right to self-determination and put an immediate end to their military intervention and occupation in foreign countries and territories and to any repression, discrimination, exploitation and ill-treatment exercised against the peoples concerned and to renounce, in particular, the brutal and inhuman methods that would be employed for these purposes²⁸⁵.

3.8.2 The legal obligations of the occupier in international law

The concept of military occupation requires legal clarification, especially when it results from an armed conflict so that the armies of one State, in a situation of war, are in the territory of another enemy state, for strategic reasons or others. The Hague Conventions are binding on the occupier of the obligations and to certain extent applied by the occupying forces.

²⁸¹ General Assembly resolution 36/109, adopted on 10 December 1981, Doc. A / 36/109.

²⁸² United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly Resolution 61/295, adopted on 2 October 2007, UN Doc. A / RES / 61/295, p12.

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ UN General Assembly Resolution 52/113, adopted on 12 December 1997.

3.8.2.1. Definition of the military occupation

According to Odile Debbasch²⁸⁶ the notion of military occupation is in the same situation as many other concepts of international law. The old notion of military occupation seemed certainly linked to the relations of two powers in time of war. However, today the presence of troops abroad is no longer the mark of hostility between two or more powers. It often tries, by a contradictory phenomenon, to strengthen between them an alliance and a system of collective security. Military bases today constitute in peacetime a living example of the notion of military occupation. However, the latter qualification of military bases is not very precise because the presence of armies in an allied country results from the application of bilateral or multilateral treaties. Other cases of military occupation result from invasions and wars. Security Council resolution 1472 (2003) described, for example, the forces of the US-British coalition as the "occupying power"²⁸⁷. This qualification was based on Article 55 of the Fourth Geneva Convention of 11 August 1949, relating to the protection of civilians in time of war. Sylvain Vite stated that the occupation means "the takeover of a territory belonging to a neutral country"²⁸⁸. The law of occupation applies in this case, even if, in accordance with the provisions of Article 2, paragraph 2, of the Fourth Convention, the State in question does not oppose any armed resistance to its adversary. Therefore, it is clear that the notion of "military occupation" implies the taking of control of a country by an enemy power during an armed conflict.

3.8.2.2. The legal regime of the military occupation

International law is binding upon the occupying forces a legal regime and obligations.²⁸⁹ However, these are not always applied and several violations of international law were

²⁸⁶ Odile Debbasch, 1961, *The military occupation powers recognized to the armed forces outside their national territory*, ed. General Library of Law and Jurisprudence, Paris, p. 1-3.

²⁸⁷ See Security Council Resolution 1472, adopted on 28 March 2003, UN doc. S / RES / 1472 (2003).

²⁸⁸ S. Vite, 2009, *Typology of armed conflicts in international humanitarian law: legal concepts and actual Situations*, Volume 91 Number 873.

²⁸⁹ According to Odile Debbasch the Second Committee of the Peace Conference, held in The Hague from 18 May to 27 July 1899, merely reproduced in Article 42 of its draft declaration, Article 1 of the Brussels Draft. The Hague Conference of 1907, moreover, devotes an identical rule: "A territory is considered occupied when it is actually placed under the authority of the enemy army. The occupation extends only to the territories where this authority is established and in a position to exercise itself. Military occupation becomes one of those means, one of those war operations whose direct and immediate aim is "to establish the superiority of the strongest of the struggling states. In this perspective, occupation is an instrument of struggle, a means of war".

committed during the occupation of Iraq²⁹⁰. Professor Jorge Cardona Llorens stated that: "the conflict in Iraq has neither been authorized nor legitimized by the Security Council and the alleged existence of weapons of mass destruction that would have justified preventive self-defence action appears over the course of controversies and investigations as a misleading argument"²⁹¹. Humanitarian law tends to limit the consequences of war. In case of occupation, the occupant must look after the public or private property of the occupied, as confirmed by Odile Debbasch, which is why an essential mission of the law of occupation is to put an effective limit on the power of the military authority established on invaded land²⁹². International law then intervenes to demand the occupiers' power a series of limits. The Geneva Convention of 22 August 1864 gives importance to the protection of hospitals and ambulances. International law is binding upon the occupier to protect civilians, to preserve the lines of communication, cultural property, etc. Article 56 of the Hague Convention of 1907 proclaims that: "the property of the communes, those of establishments devoted to worship, charity and education, to the arts and sciences, even belonging to the State, will be treated as private property ". The Hague Conventions also stated prohibition on looting (Article 47 of the Hague Regulations): "No more than the belligerent has the right to seize the property of the enemy soldiers, the occupier can not to confiscate that of the inhabitants of the invaded territory. Robert Kolb and Sylvain Vite argue that in a case of armed conflict and military occupation, the Hague Conventions must be applied to protect the civilian population and especially children. The occupying military authorities take care of the protection of the security of the occupied peoples and territories²⁹³.

3.9 Conclusion

International terrorism is different from anything called organized crime or national liberation movement. If acts of terrorism are planned, financed and perpetrated under the sponsorship of one State against another State, such acts may be characterized as acts of State armed aggression by the Security Council, which could in such cases to decide to react based on the Charter, including the principles of collective security, in order to protect international peace and security. In a state of war, terrorist offenses can be characterized as war crimes or crimes against humanity, as several internationalists have pointed out. In this case, the ICC may try

²⁹⁰ Jorge Cardona Llorens, 2004, "Liberation or occupation? The Rights and Duties of the Winning State ", in Karine Bannier, Théodore Christakis, Olivier Corten and Pierre Klen (eds.), *Intervention in Iraq and International Law*, Paris, p. 221-250.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

suspected terrorists. The absence of a single classification of terrorist offenses reflects the weakness of the international system and the flagrant legal vacuum in the international normative space. On the other hand, it has led to the strengthening of cooperation at both the international and regional levels, and has led States to develop their own national legal provisions and their domestic jurisdictions, which remain the only competent authorities in the field of terrorism.

Chapter Four

The legal issues of the accurately criminalising international terrorism

4.0 Introduction

At the time of the attacks of September 11, 2001, lawyers were unable to qualify terrorist offenses. This difficulty raised the question of the absence in international law of a general convention on terrorism, and of the absence of a general legal definition of acts of this type.

Terrorism is a real threat to international peace and security. It is condemnable in all its manifestations and in all its forms. However, how can states fight against the terrorist threat when the latter is not qualified in international law or internal law? On the other hand, is it not necessary to distinguish it from the struggle of peoples against oppression and self-determination? Should we not also differentiate between terrorism and organized crime, as well as "explosive" individual terrorism and state terrorism? Finally, in order to fight against terrorism, is it possible to consider it legally as an armed aggression and thus resort to armed force? Could its constitutive elements qualify it as a crime against humanity? All of these questions contribute to the problematic posed here. International terrorism is transnational violence, an organized criminal act and a dangerous use of force which threatening the lives of civilian populations, their property, stability and security. This type of violent force is denounced by the international community whether it is exercised by a clandestine extremist or by state or organization²⁹⁴. The use of violence by international terrorism differs from the conventional and armed interstate conflict where non-combatants are normally separated from combatants. If war had previously been interstate, terrorism, in its present form, resembles as, some say, war²⁹⁵.

²⁹⁴ See Simeon Karagiannis ,2004. "Legislation of illegal situations in international law. The example of the illegal use of force ", in Rafâa Ben Achour and Slim Laghmani (eds.), *International Law at a Crossroads. Strength of Law and the Law of Force*, op. cit., p. 105-136.

²⁹⁵ Jean-Marc Sorel, 1995, "The extension of the notion of threat to peace", in Chapter VII of the United Nations Charter: Symposium in Rennes, 50th Anniversary of the United Nations, organized by the French Society for International Law in Rennes (2-4 June 1994), preface by Boutros Ghali, ed. Pedone, Paris, p. 10-13.

4.1 The problem of the classification of terrorist offenses in international law

The United Nations General Assembly in resolution 39/159 which was adopted on 17 December 1984²⁹⁶ stated that the use of violence or the use of force by terrorists poses a serious threat to the independent existence of States and to the possibility of peaceful relations and mutual trust between them and leads to a brutal exasperation of tensions and the rise of the danger of war. The key questions at the moment concern the classification for acts of terrorism as well as the tools to combat them legally. In order to analyze the controversies over the question of the characterization of international terrorism, we must first of all put the problem of the legal characterization of this phenomenon in the context of threats to international security - a crime against peace, etc. To that end, we have established our analysis of the rules of public international law and criminal law. We will then consider the possible characterization of terrorism as a crime against humanity as provided for in ICTY, ICTR, ICC and the work of some international legal expertise, while stressing the necessary distinction between terrorism and organized crime in International law. The analysis of the legal qualification of terrorist offenses also includes work related to the Special Tribunal for Lebanon (STL)²⁹⁷. This special international tribunal was set up to try the perpetrators of the assassination in February 2005 of Lebanese Prime Minister Rafiq Hariri²⁹⁸. It entered into force on June 10, 2007, to determine the implications of those who use terror to threaten the Lebanese people, to intimidate those who fight for freedom and democracy, to guarantee indisputably the independence of Lebanon in the face of the interventions of its neighbours members and put an end to the activities of extremist groups linked to Hizbollah and Assad regime in Syria.

The terrorist threat to international peace is the result of clandestine networks of non-state groups cross border. In the face of this new threat to international peace and security, the Security Council has adopted resolutions on the basis of Chapter VII of the UN Charter and

²⁹⁶ Resolution 39/159 adopted on 17 December 1984 by the General Assembly, entitled: "Inadmissibility of State Terrorism Policy and Any State Action to Undermine the Political and Social Regime of Other Sovereign States".

²⁹⁷ In accordance with Security Council Resolution 1757 of 30 May 2007, the "legally binding" provisions of the Agreement between the United Nations and Lebanon on the establishment of the Special Tribunal for Lebanon (Statute of the STL) are entered into force on 10 June 2007, while the Lebanese Parliament has not ratified them. See resolution 1757 (2007) adopted by the Security Council on 30 May 2007, S / RES / 1757 (2007). See also "Expiry of the deadline for the establishment of the Special Tribunal in Lebanon, the UN takes matters into its own hands," UN News Centre, article published on June 29, 2007.

²⁹⁸ By Resolution 1757, taken under Chapter VII of the UN Charter, the Security Council decided to establish an International Tribunal to try the killers of former Lebanese Prime Minister Rafiq Hariri, stating that, his refusal to accept that this crime remains unpunished. Adopted by 10 votes out of 15, five countries abstained in the vote on this resolution: China, Russia, South Africa, Indonesia and Qatar.

two issues were observed; the number of measures it can take by the Security Council of how can respond to the threat by using force; and the terrorist threat is then compared to a state resort to force²⁹⁹. Based on these two elements, the United States has turned primarily to the use of armed force against terrorist organizations such as Al Qaeda and ISIS.

Terrorism may therefore constitute, according to the Security Council, a threat to peace but according to Pellet and Tzankov this is not always the case³⁰⁰. They point out that in the not-so-distant past such acts have not always been considered to constitute threats to peace. The Security Council, in adopting resolution 1368 of 12 September 2001 on the basis of Chapter VII of the UN Charter³⁰¹, condemned the terrorist acts it described as a threat to international peace and security and highlighting that those who bear the responsibility of helping, supporting and harbouring the perpetrators, organizers and sponsors of these acts shall be accountable³⁰². It was the first time that the Security Council adopted a Chapter VII resolution against a transnational group and not against a state. Moreover, the Security Council further connect any act of international terrorism with a threat to international peace and security, while in resolution 1269 (1999)³⁰³ it considered that certain acts of terrorism and not all terrorist acts could constitute such a threat. On the contrary, Professor Luigi Condorelli stated that terrorism very serious threat to peace and believes that this threat requires a collective response because no state, even the most powerful, can claim to be able to overcome it by only single state action³⁰⁴. Meanwhile, Josiane Tercinet adds that there is therefore the idea that the threat is multiform of diverse origin and difficult to determine or localizable and that these characteristics is born the threat to international peace³⁰⁵.

The legal characterization of terrorism raises several questions that take into account existing legal concepts and gaps:

²⁹⁹ Pierre-Marie Dupuy, 2004, "The international community and terrorism", in *New threats to international peace and security*, Paris, , p. 35-36.

³⁰⁰ Alain Pellet and Vladimir Tzankov, 2001. "Can the state victim of a terrorist act use force? ", *New threats to international peace and security*, P. 94-96.

³⁰¹ Security Council resolution 1368 (2001), Doc.S / RES / 1368 (2001), 12 September 2001.

³⁰² After September 11, 2001, family members of the victims of the attacks lodged a complaint against members of the Saudi royal family and a number of Saudi organizations accused of funding al-Qaeda. See Patrick Jarreau, 2002, "The Plaintiffs' Advocates Against September 11th Officials Target Al Sauds", *Le Monde*, August 28, 2002, p. 3. See also the article entitled "The mysterious 'golden chain' of Saudi al-Qaeda financiers", *Le Monde*, March 19, 2003, p. 15.

³⁰³ Security Council resolution 1269 (1999), UN Doc. S / RES / 1269 (1999), 19 October 1999.

³⁰⁴ Luigi Condorelli , 2001, "The attacks of September 11 and their aftermath: where does international law go? *RGDIP*, p. 832. This qualification is taken up by the resolutions: 1373 unanimously adopted on 28 September, 1377 of 12 November 2001, 1309 of 16 January 2002, 1438 of 14 October 2002 on the attack in Bali and in Resolution 1440 of 24 October 2002 on the attack perpetrated in a Moscow theatre.

³⁰⁵ See Josiane Tercinet, 2004, "The Security Council and Terrorism", in Stanislav J. Kirschbaum (eds.), *Terrorism and International Security*, Bruylant, Brussels, p. 57-58.

- What legal classification could result from the approximation of the various conceptions of terrorism proposed by international law and national rights?
- Why did the International Law Commission first describe this phenomenon, in 1986, as a crime against humanity, especially when committed by private individuals, and then proposed in 1991 to make it a crime against humanity or autonomous crime while underlining the aggression it entails and the terror it spreads?
- Which criterion to use that of the Security Council which qualifies terrorism as a threat to international peace and security or the Nuremberg International Military Tribunal that terrorism is a crime against peace?
- Certainly acts of terrorism constitute threats to peace. However, what type of terrorism is targeted: private non-state terrorism, international terrorism, state terrorism or cross-border terrorism on behalf of a state?
- Which authority could be used to sanction acts of terrorism in general? Can the global fight against terrorism and the suppression of terrorism at the regional and national levels succeed without adopting a clear single international legal authority?

The law is constantly evolving and revealing uncertainties. In order to analyze the legal problems of the characterization of international terrorism in criminal law, the first part of this chapter will be devoted to the criminal law qualifications of the Nuremberg Military Tribunal and those of the United Nations. It will then analyze the legal classification of terrorism as a crime against humanity adopted by international jurisdictions before seeing that adopted in the context of the HARIRI case by the STL, the first international mixed jurisdiction set up to deal exclusively with crimes of terrorism .

4.2 International Criminal Law in the Law of the Nuremberg Military Tribunal and the courts established by the United Nations: Multiple Definitions of Terrorism

The question that arises is which classification may be best correspond in the existing body of law to international terrorism; is it the crime against international peace and security or armed aggression? It will then be necessary to question that the legal method can then be used to combat and repress international terrorism. The question will be raised as to the extent to which terrorism can be legally characterized as armed aggression, while terrorist attacks are perpetrated by non-state groups. Similarly, can terrorist acts in some countries threatening only the citizens of these countries pose a general threat to world peace and international security? This last qualification appeared, in fact, since the fall of the Berlin Wall, in

particular with the adoption of the resolution 731 of January 1992 in relation to the attacks of Lockerbie and Flight of 772³⁰⁶. On 21 January 1992, at its 3033rd meeting, the Security Council adopted the text of the draft resolution submitted a day earlier by the United States, France and the United Kingdom. Under the terms of the resolution, the Security Council members strongly condemning the destruction of PAN AM 103 and calling on all States to assist in the perpetrators of this criminal act are arrested and tried. Also deeply concerned by what results from investigations involving officials Libyans and which is mentioned in the documents of the Security Council which report requests addressed to the Libyan authorities by the United States of America, France and the United Kingdom related to the judicial proceedings concerning the attacks on the abducting of Pan American and the Air Transport Union, determined to eliminate international terrorism by;

- Condemns the destruction of Pan American Flight 103 and Flight 772 of the Air Transport Union and the loss of hundreds of lives resulting there from;
- Deeply deplores the fact that the Libyan Government has so far not responded effectively to the above requests for full co-operation in establishing responsibility for the above-mentioned terrorist acts against flights 103 of Pan American and 772 of The Air Transport Union;
- Urges the Libyan authorities to immediately provide a full and effective response to these requests in order to contribute to elimination of international terrorism;
- Requests the Secretary-General to seek the cooperation of the Government of Libya in providing a comprehensive and effective response to these requests;
- Calls upon all States to encourage individually and collectively the Libyan Government to provide a comprehensive and effective response to these requests;

Similarly, Alain Pellet did not refuse to describe the terrorist attacks of September 11 as threats to peace, as stated by resolution 1368 adopted the following day after the attack by the Security Council. However, he said it did not result in a state of war in the generally accepted sense of the word³⁰⁷. Gerard Chaliand also confirmed that terrorism is undoubtedly more of a threat to the security than to the peace³⁰⁸. While the international community has

³⁰⁶ Security Council resolution 731 (1992), UN Doc. S / RES / 731 (1992), 21 January 1992.

³⁰⁷ Alain Pellet, 2001, *Malaise in the war; what is the purpose of the UN ?* Le Monde, November 15 , p. 16.

³⁰⁸ Gerard Chaliand, 2001. *This is not a war, it is the steadied of classic terrorism*, Le Monde, September 18, p. 9.

characterized terrorism as a threat to international peace and security³⁰⁹, some jurists, such as Jean-Marc Thouvenin³¹⁰, have criticized this characterisation. While questioning the new forms of threat which present new challenges to the collective security system, emphasizes that such a qualification results from a political assessment and not from the application of legal criteria. According to him, the concept of a threat to international peace and security lacks indisputable definitions. Certain acts of terrorism may have been characterized not only as threats to international peace and security but as an aggression, and this is due to evolving interpretations of certain growing legal concepts³¹¹. This is gradually expanding the possibilities of their implementation, and therefore appears that terrorist acts can be legally qualified as threats to international security. This is what the ICJ says in its judgment in the case concerning the Gabčíkovo-Nagymaros Project (Hungary / Slovakia) of 25 September 1997, when it states that the treaty to be 'interpretation in the present case' is not merely fixed, since it contains 'evolutionary provisions'³¹².

Professor Brigitte Stern went further and describing the attacks of 11 September 2001 as crimes against peace and not just threats to international peace and security³¹³. He stated that "one could think of supporting that was committing a crime against peace, since by recognizing the United States the right of individual or collective self-defence, the Security Council in resolution 1368 (2001) of 12 September 2001 implicitly admitted that acts committed amounting to armed aggression, the only situation which gives rise to the right of self-defence according to the UN Charter³¹⁴. According to Professor Stern, a crime against peace exists if the acts complained of are intended to protect, prepare, unleash or continue a war of aggression. This internationalist based his legal qualification of international terrorism on the approaches adopted during the trial before the International Military Tribunal at Nuremberg (IMT)³¹⁵. This trial and the Nuremberg judgments, which followed the

³⁰⁹ See, for example, GA / SM / 274 press release of 9 October 2001 reporting that the President of the General Assembly stated that "(...) international terrorism poses a threat to international peace and security as well as to a crime against humanity.

³¹⁰ Pratter, Jonathan, 2008. *The Fundamental Rules of the International Legal Order*. Edited by Christian Tomuschat & Jean-Marc Thouvenin, 2006. Leiden; Boston: Martinus Nijhoff Publishers, p. ix, 471.

³¹¹ Ibid.

³¹² ICJ. 25 September 1997, Gabčíkovo-Nagymaros Project (Hungary / Slovakia), aff. 92, Reports of Judgments, 1997, p. 67, para. 112 of the judgment.

³¹³ Brigitte Stern, 2004. 11 September 2001; What international legal responsibilities?, In *Liberties, Justice, Tolerance, Mixtures in Honor of Dean Gerard Cohen*, Vol II, Bruylant, Brussels, p. 1467-1497.

³¹⁴ Ibid.

³¹⁵ The International Military Tribunal at Nuremberg (IMT) against the great Nazi war criminals of the war was very important at the time of its pronouncement. This tribunal, which was held in Nuremberg from October 18, 1945 to October 1, 1946, was established by the London Agreement of August 8, 1949 between France, the United States, the United Kingdom and the former Soviet Union for the pursuit and punishment of the great war criminals of the European Axis Powers. See Eric David, 1988, "The Legal News of Nuremberg", in *Centre for*

conclusion of the London Agreement of 8 August 1945, constitute an exceptional event both in the history of international relations and in international law. According to Article 6 of the Nuremberg IMT, a crime against peace is the direction, preparation, initiation or continuation of a war of aggression, or a war in violation of treaties, insurance or international agreements, or participation in a concerted plan or conspiracy to perform any of the foregoing acts "³¹⁶.

However, should the acts of terrorism be considered as a war of aggression or a war in violation of treaties, for some jurists to call them crimes against peace? Terrorist attacks undoubtedly violate international law, the UN Charter and international agreements, but to what extent could they be described as armed aggression in the legal sense of the word when perpetrated by illegal criminals belonging to a non-state organization, of the Al-Qaeda or ISIS type, not acting on behalf of a state?

Professor Alain Pellet criticizing the speech of the former US President Georges W. Bush, declaring in the aftermath of the attacks of September 11 "we are at war," said that these attacks cannot be legally qualified as a war of aggression³¹⁷. Pellet was in favour of the characterization of these attacks of threats against the peace and of crimes against humanity, but he contested those of war or even of aggression against legal meaning. The International Law Commission (ILC), established on 21 November 1947 by the United Nations General Assembly in resolution 174 (II)³¹⁸, with the aim of promoting the progressive development of international law and its codification, did not hesitate in 1950 to consider as a crime against the peace and security of humanity not only all acts of aggression but also the threat of aggression, terrorist activities, incitement to civil war, assistance to armed forces, measures of political and economic intervention, provided that those acts were committed by one State against another State³¹⁹.

It can be seen from the comparison of Nuremberg Law and the work of the ILC, that terrorist attacks are not a war in the legal sense of the word, but rather are a threat and a crime against peace when they are directed, prepared and unleashed by one or more States against one another or other States³²⁰. This categorisation was retained by various resolutions of the

International Law, The Nuremberg Trials, Consequences and Updates, International Colloquium, University of Brussels, 27 March 1987, ed. Bruylant, Brussels, p. 19

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ General Assembly Resolution 174 (II) of 21 November 1947.

³¹⁹ See "Principles of International Law Relating to the Status of the Nuremberg Tribunal and the Judgment of that Tribunal", ILC Report, published in A.C.D.I., 1950, vol. II., P. 266-269.

³²⁰ On 13 February 1946, the General Assembly of the United Nations adopted resolution 3 (I), while taking note of the definition of war crimes, crimes against peace and against humanity such as it states in the IMT

Security Council, notably by the two famous resolutions 1368 and 1373. It was not refused by the jurists who, on the contrary, affirmed that positive international law as interpreted State practice now views terrorism as a threat to international peace and security of a new type as compared to the traditional use of force between states through armed aggression, as prohibited by Article 2 (4) of the Charter and by customary international law³²¹.

In the following sections, we will try to know if terrorism can be qualified as an act of armed aggression. We will then discuss the necessary distinction between international terrorism and organized crime mentioned by several writers and researchers. The choice of these concepts is based on UN legal work, Security Council resolutions, judgments and legal definitions formulated by the ICJ. This will not only be a legal analysis of the multiple qualifications of terrorism, but also the proposals of several legal experts in the field who are more open to the possibility of the United Nations adopting a single legal qualification terrorism.

4.3 Controversies over the question of the characterization of terrorism: an armed aggression?

Prior to 2001, the Security Council neither decided nor authorized the use of armed force against private small groups. They could have done so had they been able to characterize a particular situation resulting from terrorist acts as a crime against peace. This is why, since 11 September, we have witnessed the expansion of the concept of armed aggression and self-defence into international law. The various terrorist acts organized and committed at the international level, tending to destabilize certain States even certain regions. This crime, moreover, is sometimes supported by States and relies on structured networks capable with important means and having ramifications in different states³²².

Terrorist acts appear, as we know, not only as a threat to peace but also as recourse to force and violence against innocent people, against a State either on the territory of a State, against its property and its civilian population; or outside its territory, against members of its diplomatic staff or armed forces or against ships entering its flag³²³.

Charter of 8 August 1945 ", it recommended that States take the necessary measures to arrest and transfer war criminals to the countries where they committed their crimes.

³²¹ Pierre-Marie Dupuy, 2004, "The international community and terrorism", in *New threats to international peace and security*, Paris, p. 35-36

³²² Jean-Pierre Queneudec, 2010, "New Threats to Peace and Security and International Public Order", in *New Threats to International Peace and Security*, Franco-German Day, op. cit., p. 287-289.

³²³ Ibid.

These new threats are based on a sort of "privatization" of the use of force which is sometimes facilitated or encouraged by a complicit State, provided that the perpetrators of the attack are sent by or act on behalf of that State.

Whether it is international terrorism in general or the attacks of 11 September 2001 in particular, attempts to legally qualify these acts are still controversial. The internationalist Yann Jurovics stressed that "because of the uncertain and variable nature of terrorism and the difficulties inherent in its definition, it is indeed difficult to find an existing criterion that could cover all acts of terrorism"³²⁴. He also added that "the acts committed on September 11th do not correspond exactly to the models of prosecution offered until now by international law"³²⁵. These events have been described in both Security Council Resolutions 1368 (2001) and 1373 (2001) as "a threat to international peace and security", but this qualification is general and does not bring anything very new for the international criminal repression of terrorism. The Security Council in the introduction to this resolution has described "any act of international terrorism as a threat to international peace and security"³²⁶.

The United States counter-terrorism war was based on the main legal argument of Article 51 of the UN Charter: "self-defence". The US regards the terrorist attacks of 11 September 2001 as acts of armed aggression by irregular forces and supported by a state, Afghanistan, which has sheltered, tolerated or even helped without limits the terrorist activities of Al Qaeda and led by the Saudi Arabia citizen Usama Bin-Laden. The Security Council, in the aftermath of these attacks, recognized in resolution 1368 the inherent right of individual or collective self-defence in accordance with the Charter, reaffirmed a second time in another recital of its resolution 1373³²⁷.

With regard to these events, Olivier Corten and François Dubuisson stated that this argument poses a problem from the outset with regard to the international law established by the United Nations Charter, which limits this hypothesis to the necessary and proportionate response by

³²⁴ Yann Jurovics, 2002, *Controversies over the question of the characterization of terrorism: common law crime, war crime or crime against humanity?* In the collective work, *International law against terrorism, under the direction of Karine Bannel, Theodore Christakis, Olivier Corten and Barbara Delcourt*, Paris, ed. Pedone, p. 95-96.

³²⁵ Ibid.

³²⁶ See resolution 1368 (2001), op. cit. p.1. Also the introduction to resolution 1373 (2001) broadened this qualification to include "any act of international terrorism". In fact, the Security Council has affirmed that "such acts, like any act of international terrorism, constitute a threat to international peace and security". See the preamble to Security Council resolution 1373 (2001) adopted on 28 September 2001, UN Doc. S / RES / 1373 (2001), op. cit., p. 1.

³²⁷ See resolution 1368 (2001) and resolution 1373 (2001), op. cit. p. 1.

a State to armed aggression perpetrated by another State³²⁸. It must then be determined to what extent the 9/11 attacks and other terrorist acts can be legally qualified as armed aggression. The latter certainly has legal aspects. However, the characterization of terrorist acts committed by non-state groups remains a complex qualification.

4.3.1 Legal aspects of armed aggression in international law

Professor Marcelo G. Kohen points out that "one of the characteristic elements of terrorism is the fact that it is the product of behaviour by individuals or private groups"³²⁹ and that terrorist acts are crimes perpetrated, generally, by organized non-state organizations or groups. For this reason, the Security Council has called on states, in several resolutions, to take effective measures to combat terrorism and not to support or finance, shelter or shelter the members of terrorist organizations³³⁰. Gilbert Guillaume³³¹, in his course at The Hague Academy of International Law, said that four essential elements characterize terrorist acts:

(a) the perpetration of certain acts of violence, (b) to spread terror among the public, (c) an individual or collective undertaking for the commission of such acts; (d) and the clandestinely or surprise element of secret terrorist actions. Terrorism is violent acts aimed at spreading terror to achieve political ends and violence is its material element³³².

The requirement of some clandestine organization or at least the preparation or planning of such acts is part of the intentional element. Armed aggression has, moreover, other specific constitutive acts, which reflect the direct or indirect involvement of one or more States.

4.3.1.1. Constitutive acts of armed aggression

The Dictionary of Public International Law defines aggression as "an armed attack by a state acting first against another state in violation of the rules of international law"³³³. The UN Special Committee on the Definition of Aggression has developed the following definition adopted by the General Assembly in its resolution 3314 (XXIX) of 14 December 1974³³⁴;

³²⁸ Olivier Corten and François Dubuisson, 2002, "Operation" "Unchanging Freedom" "an abusive extension of the concept of self-defence", RGDIP, No. 1, 2002, p. 51-53.

³²⁹ Marcelo G. Kohen, 2002, "The Controversies on the Question of " State Terrorism " in International Law on Terrorism, a collective work, edited by Karine Bannelier, Théodore Christakis, Olivier Corten and Barbara Delcourt, op. cit., p. 83-93.

³³⁰ See in particular resolutions 1368 and 1373.

³³¹ Gilbert Guillaume, 1989, "Terrorism and International Law", op. cit., p. 304.

³³² Ibid.

³³³ Jean Salmon, 2001, Dictionary of Public International Law, Bruylant, Brussels, p. 52-53.

³³⁴ General Assembly resolution 3314 (XXIX) (1974), adopted on 14 December 1974, entitled "Definition of aggression". See Resolutions adopted by the General Assembly at its twenty-sixth session, Vol. I, General Assembly, Official Records, Supplement No. 31 (A / 9631), p. 148-150.

"Article 1. Aggression is the use of armed force by one State against the sovereignty territorial integrity or political independence of another State, or in any other way incompatible with the Charter of the United Nations, as follows from this definition "³³⁵.

Article 3 of the above-mentioned resolution listed the following acts as aggression: "(a) the invasion or attack of the territory of one State by the armed forces of another State, or any military occupation even temporary, resulting from such an invasion (...); (b) the bombardment by the armed forces of one State of the territory of another State (...); (c) the blockade of the ports or coasts of one State by the armed forces of another State; (d) the attack by the armed forces of one State against land, naval or air armed forces, or the naval and civil aviation of another State; (...) (e) the sending by or on behalf of a State of armed bands or groups, irregular forces or mercenaries engaging in acts of armed force against another State (...)"³³⁶.

In accordance with Article 51 of the UN Charter, this kind of state armed attack gives rise to a situation that can be defined by the Security Council as self-defence. The State victim of an act of armed aggression may implement Article 51 of the Charter relating to self-defence, according to which: "Nothing in this Charter shall affect the natural right of self-defence, individual or collective, where a member of the United Nations is the object of an armed aggression (...)"³³⁷. The latter is also defined by the same dictionary also as "right of armed reaction which individually or collectively, any State which has been the victim of an armed aggression"³³⁸.

The members of the Security Council are still reluctant to allow the International Criminal Court (ICC) to prosecute the perpetrators of "aggression". On 13 February 2009, the Special Working Group on the Crime of Aggression (GTSCA), established under the Treaty Establishing the International Criminal Court (ICC), announced a historic breakthrough. After five years of deliberations, the members of the Group declared that they had finally reached an agreement on a draft definition of the crime of aggression. The treaty establishing the Court, the Rome Statute, provided that the crime would be prosecuted, but at the time of its elaboration, the drafters of the Statute had not been able to agree on a definition. The initiation of prosecution for this crime had therefore been suspended until the Statute could be amended to include this definition. The Assembly of States Parties was submitted the definition proposed by the Working Group to its Review Conference in May 2010 in

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Jean Salmon, 2001, Dictionary of Public International Law, op. cit., p. 642.

Kampala, Uganda. As a first step, States Parties adopted a series of amendments defining "aggression" and setting out how the Court could deal with it. Following the Review Conference, article 8 was added to the Rome Statute: "the crime of aggression" means the planning, preparation, launching or execution by a person effectively able to control or direct the political or military action of a State, an act of aggression which, by its nature, seriousness and extent, constitutes a clear violation of the Charter of United Nations ". They detailed as an "act of aggression" includes: the invasion, bombing, and blockade of ports or coastlines of a state by the armed forces of another state or sending by a state or in the name of a State of bands, groups, irregular troops or armed mercenaries.

The second step in activating the concept of "aggression" was for this year. However, it seems that the permanent members of the Security Council (France, Great Britain, United States, China, Russia) continue to be opposed to this possibility of prosecuting the perpetrators of aggression. Yet, the proposal on the ICC table gives guarantees to the five powers. It prevents an attorney from initiating an investigation without first informing the Security Council, which may request a suspension for one year renewable. It also provides that a State may exempt its nationals from prosecution by the Court for that reason if it so provides in a written declaration. These guarantees did not remove the prejudices of the members of the Security Council. It seems that the annual meeting of the ICC member states will not give the go-ahead for a possible prosecution of the perpetrators of aggression. The fear of the great powers is to see persecuted within the ICC military interventions that they decided in the name of issues including humanitarian.

The ICC, established in 1998 and established in The Hague, can try the perpetrators of genocide, crimes against humanity and war crimes, but cannot prosecute the perpetrators of "aggression". This is due to opposition, since its inception, by the permanent members of the UN Security Council, who do not want to see their leaders dragged into international justice. Two recent examples illustrate the risk of such procedures. An Iraqi general had accused former Prime Minister Tony Blair for "illegal invasion of Iraq." However, this was dismissed by the High Court of the United Kingdom. Also African activists filed a complaint in court against Nicolas Sarkozy for the 2011 intervention in Libya.

According to these definitions, it will be observed that it is difficult to qualify legally the private terrorist acts perpetrated by non-State underground organizations as an act of aggression unless committed by State agents or by persons acting on behalf of a State. The act of armed aggression is generally attributed only to State agents, as stated by the International Law Commission, and more particularly to its principal political leaders or state

organizers: "These terms" leaders "or" organizers "must to be understood in a broad sense, that is, to designate, in addition to members of a government, persons occupying a high position in the military apparatus, the diplomatic corps, political parties or the business community" ³³⁹.

4.3.1.2. The direct or indirect involvement of one or more States

The international legal rules may determine the involvement, direct or indirect, of a state or more states in an armed aggression. The jurisprudence of the ICTY may help to clarify the conditions under which a State should be considered according to the rules of international law to be involved in a terrorist act committed on the territory of a third State. The ICTY Appeals Chamber, in the *Tadic* judgment of 15 July 1999³⁴⁰, determined under what conditions the armed forces of a clandestine group are deemed to be acting "on behalf of" a third State. The Chamber ruled that "to blame a State for acts committed by military or paramilitary groups, it must be established that the State exercises overall control over the group, not only by equipping and financing it, but by also by coordinating or assisting in the overall planning of its military activities" ³⁴¹.

The ICJ, in the "Case concerning border and cross-border armed actions, (*Nicaragua v. Honduras*)" ³⁴² had clarified that the responsibility of a third State could be engaged by an unlawful act committed by perpetrators who had acted in fact on behalf of that third State, and provided that the latter State have effective control over the armed forces responsible for the violation at the time the alleged violation was committed³⁴³. According to the highest international court, the effective control of the third State must be established at the moment of aggression, whereas the ICTY requires the third State to exercise overall control which does not necessarily imply effective control over each of the acts committed by the controlled group. Cecile Toutnaye underlined that this jurisprudential development could lead to an extension of the causes of attribution of a terrorist act to a State. There is indeed a desire to widen the hypotheses in which the responsibility of a State can be engaged (...) ³⁴⁴. The intention element of an armed aggression will consist in the knowledge that the accused (the

³³⁹ See the "Draft Code of Crimes against the Peace and Security of Humanity" of the International Law Commission, CIDA, 1954, vol. II, § 2, p. 269-271.

³⁴⁰ ICTY, Prosecutor v. Dusko Tadic, 15 July 1999, aff. No. IT-94-1-A, para. 131.

³⁴¹ Ibid.

³⁴² ICJ, 20 December 1988, Case concerning border and cross-border armed actions, (*Nicaragua v. Honduras*), Reports of Judgments, Advisory Opinions and Orders 1988, case 74, p. 103.

³⁴³ Ibid.

³⁴⁴ See Cécile Toutnaye, 2008. "The contribution of the ad hoc tribunals for the suppression of terrorism", in Victims and international criminal responsibility, op. cit., p. 425-427.

armed terrorist group or the third State) of the nature of that unlawful act and their intention to contribute to it³⁴⁵.

4.3.2 Armed aggression by terrorist groups: a complex qualification

Armed aggression is, in general, a state act involving an aggressor State and an aggrieved State. Legally, it is difficult to characterize terrorist acts as acts of armed aggression, as these acts are often perpetrated by clandestine non-state organizations.

4.3.2.1. A difficult qualification

Francois Bugnion³⁴⁶ distinguished between non-war terrorist act of violence and warrior act of violence. While the latter targets fighters and soldiers of a specific army and is subject to the rules gradually codified in the Geneva Conventions of 1864, 1906, 1929 and 1949, in the Declaration of St. Petersburg of 1868 and in the Hague Conventions of 1899 and 1907. Non-war terrorist act of violence threatens the civilian population and non-combatants, and is not provoked by a state, in most cases, but by different organizations with political objectives³⁴⁷. Aggression, according to this author, depends on a state decision. It stated that war is an attribute of state sovereignty, subject to the rules of international law and the UN Charter which prohibits the use of force in international relations, with the exception of collective coercion provided for in Chapter VII and the right of individual or collective self-defence reserved by Article 51. War of aggression, as a war unleashed by an aggressor State against another aggrieved State, is subject to the norms governing reciprocal of belligerents "*jus in bello*" and the norms relating to the regulation and prohibition of the use of force "*jus ad bellum*". According to him, justice requires an absolute distinction between the aggressor and the victim of aggression; it is not legitimate for humanitarian law to place on the same level the aggressor state and the one that resists aggression since the war of aggression constitutes the war crime par excellence³⁴⁸. In other words, the aggressor state puts himself in the position of an outlaw, (and he) cannot be the holder of rights that have their source in an illegal act³⁴⁹.

³⁴⁵ The execution of this act is linked to the existence of a group or a clandestine organization collective. On the concept of joint criminal enterprise in ICTY case law, see Prosecutor v. Radoslav Brdanin aff. IT-99-36-T, December 3, 2003, p31.

³⁴⁶ Francois Bugnion, 2002, "Just war, war of aggression and international humanitarian law", International Review of the Red Cross, No. 847, vol. 84, p. 523-546.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Hensel, H., 2008. The Legitimate Use of Military Force: the Just War Tradition and the Customary Law of Armed Conflict, Hampshire, Ashgate, p300-303.

The Aggressor State may be identified or designated by the Security Council. However, in the case of a non-state terrorist attack, the difficulties inherent in the designation of the aggressor cannot be ignored. With regard to resolution 3314 (XXIX) adopted on 14 December 1974 by the UN General Assembly, Francois Bugnion points out that it is far from constituting a true definition; it is virtually silent on the forms of indirect aggression that characterize our time, such as subversion, terrorist attacks, foreign intervention in the event of civil war, occupation with the agreement of a dependency government, and so on. In addition, Resolution 3314 has taken into account an essentially subjective element, the ground for the use of arms, as this is inconsistent with a true definition since a definition able of having legal effects therefore it should be based on fact and objectives element³⁵⁰. Finally, this resolution does not bind the Security Council, similarly, only the Security Council can specify the existence of a threat to peace, a breach of the peace or an act of aggression³⁵¹. The difficulties are not resolved: the decision of the Security Council could not have legal effects beyond those provided for in the Charter or other treaty provisions.

4.3.2.2. New extension of international law

The analysis of the content of resolution 3314 (XXIX) shows that it is only because of very precise conditions that a State may be held responsible for acts of aggression perpetrated by "irregular forces" or terrorist groups. A first hypothesis to be considered is that where a state, which is suspected of sending this type of force, is firstly aware of the future aggression action, then has itself participated in planning and the execution of this act, and finally, accepted or tolerated that its territory be used to commit armed actions.

A second hypothesis is that developed by the ICJ in the judgment on "military and paramilitary activities in and against Nicaragua", in which it states that it "does not think that the notion of armed aggression can cover assistance to rebels in the form of supply of armaments or logistical or other assistance "³⁵². In another passage of this judgment, the ICJ refrains from equating the supply of arms by a state with armed gangs to armed aggression. It also states that: "If the concept of armed aggression includes the sending of armed gangs into the territory of another State, the supply of arms and the support given to such bands cannot be equated with armed aggression. Nevertheless, such activities may well constitute a breach

³⁵⁰ Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX).

³⁵¹ Article 39 of the UN Charter.

³⁵² ICJ, 26 November 1984, "Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)", Case No. 70, Reports 1984, pp. 392-443.

of the principle of non-use of force as well as interference in the internal affairs of a State, that is to say, unlawful conduct, but less serious than armed aggression³⁵³.

Olivier Corten and Francois Dubuisson supported this opinion while stressing that "the thousands of victims of these actions did not bring the Court to qualify the support of the United States other than interventions in cases under the national jurisdiction of Nicaragua or for some of these aspects, unlawful use of force"³⁵⁴. The Military Activities case has thus enabled the ICJ to determine the conditions under which armed support to irregular forces may be characterized as unlawful use of force or as an act of state armed aggression³⁵⁵.

On the basis of these opinions, these two jurists did not describe the attacks of 11 September 2001 of acts of armed aggression, as they noted that the perpetrators of these criminal acts were not members of the official organs of the Afghan state led by the Taliban, nor Afghans, but that most they had Saudi nationality.

Nevertheless, since the events of September 11, 2001, there has been an extension of the definition of armed aggression. The Security Council has expanded the concept of armed aggression in resolution 1368 (2001), which has resulted in an expansion of international responsibility acts committed by terrorist organizations may be attributed to any State that supports, helps, shelters and houses them. Before 9/11, no United Nations body accepted the self-defence argument when it was used to justify a response to an alleged indirect armed aggression of mere support to irregular forces. By relying of course on the gravity of terrorist acts, they are now assimilated to armed attacks by regular forces. This qualification, which does not quite correspond to terrorist acts committed by non-State terrorist organizations, even if they reach a very high threshold of gravity, allows the use of force against terrorism. This use of force can only be envisaged by Article 51 of the Charter if the Security Council authorizes it to fight terrorism internationally. In such a case, the Victim State may resort to armed force in response to a terrorist act, through the system of collective security.

³⁵³ Ibid.

³⁵⁴ Olivier Corten and Francois Dubuisson, 2002, "Operation "Immovable Freedom" an abusive extension of the concept of self-defence", op. cit., p. 58.

³⁵⁵ The Security Council condemned, for example, the Israeli armed aggression against Lebanon in 1982 (see resolutions 508 and 509 condemning the operation of the Israeli army nicknamed "Peace in the Galilee"), or against Tunisia in 1985 (See Resolution 573, in which the Security Council described the Israeli raid on the PLO headquarters in Tunis as "an act of aggression", or when South Africa and Southern Rhodesia led, during the 1970s and 1980s, a series of armed operations on the territory of several states, such as Botswana, Zimbabwe, Zambia or Angola, aimed at striking "terrorist" bases.

4.4 International Terrorism and Organized Crime

Over the last decade, transnational organized criminal groups have built large-scale international networks. They record vast profits through various illicit activities and acts of intimidation. According to the statement of the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, organized criminal groups engage in the trafficking of human beings, especially women and children, for the purpose of slavery, economic and prostitution. They engage in the illicit trade in weapons and ammunition, the trafficking of illicit substances and nuclear material, fraud on an international scale, and launder huge sums of money. They bribe and buy public officials, politicians and business leaders³⁵⁶.

Organized crime marks current criminal systems and is a challenge on two counts. A political-criminal challenge, in the sense that this phenomenon presents itself as a power structure that can destabilize the state, or at least compete with it. It is also a legal challenge, as responses in some states have developed outside the criminal legal framework. Open borders and technological advances, which have given new impetus to international trade and have also allowed criminal groups to multiply and expand their activities to all countries and continents for example, trafficking in weapons, drugs and nuclear materials, global scams, huge launderings, migrant smuggling, and so on.

According to a United Nations General Assembly press release, the links between drug trafficking and transnational criminal activities, which finance international terrorism, dominated the Third Committee's discussions which concluded on crime prevention and criminal justice as well as international drug control³⁵⁷. Many delegations noted during the discussions that it is necessary to cut the profits from this crime in order to destabilize the bases of terrorist organizations. In this regard, all delegations expressed their support for the UN conventions, notably "the Convention against Transnational Organized Crime" of Palermo³⁵⁸ and Resolution 1373 (2001) of the Security Council which establishes a close link between transnational organized crime and international terrorism³⁵⁹. The question is terrorism legally a form of organized international crime? Is there not a difference in international law between terrorist organization and criminal organization? A legal distinction

³⁵⁶ See the proceedings of the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Vienna, 10-17 April 2000).

³⁵⁷ The link between terrorism and transnational organized crime at the heart of the Third Committee's deliberations", press release, AG / SHC / 523, 17 October 2001.

³⁵⁸ See "The Convention against Transnational Organized Crime" of Palermo, Italy, adopted on 8 January 2001.

³⁵⁹ See Xavier Raufer Aufer and Stephane Quere, 2000 , Organized Crime, Presses University de France, p.7.

between acts of international terrorism and organized crime is necessary, although the links between the former and the latter are considerable.

4.4.1 The necessary distinction between organized crime and terrorism

It is important to emphasize from the outset the link established in international context between terrorism and organized crime. This is the case both in the Joint Action of the European Union on the Criminal Organization of 1998³⁶⁰ and in the Introduction to the UN Convention on Transnational Organized Crime³⁶¹ adopted in Palermo (Italy) on 8 January 2001. In the first text, terrorism is mentioned among the forms of organized crime making it necessary to reinforce cooperation between member states. In the second text, the General Assembly noted with deep concern the growing association between organized crime and terrorist crimes. It considered this new convention as an effective means and the necessary legal framework for international cooperation in combating *inter alia* criminal activities such as money laundering, corruption, illicit trafficking, cultural heritage damage and links between transnational organized crime and organized crime³⁶².

From a criminological point of view, it is indeed a particular form of crime that has been inserted, on the one hand, into the power structures of contemporary societies, and on the other hand, which presents the elements of an associative crime: permanence, professionalism, organizational structure, etc. It is a crime heavily attached to the markets for arms, drugs, smuggling, and money laundering³⁶³. It is for this reason that we must consider that the problem can no longer be solved at the national level. A fight against this crime will only be effective after having defined and clarified legally organized international crime, and only after determining its constituent elements in international law.

4.4.1.1. Organized crime: legal definitions

Following the concern and the importance of the fight against organized crime, the General Assembly meeting on 8 January 2001 adopted the United Nations Convention against Transnational Organized Crime. The provisions of which should enable member states to better combat organized crime. According to Article 2 (a) of the Palermo Convention, the term "organized criminal group" means a structured group of three or more persons who have

³⁶⁰ Joint Action No 98/733 / JHA of 21 December 1998 adopted by the European Council on the criminalization of participation in a criminal organization in the EU Member States, J.O.C.E. L 351 of 29 December 1998, p.1-3.

³⁶¹ See the preamble to the Palermo Convention against Transnational Organized Crime.

³⁶² The General Assembly adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the Protocol against the smuggling of Migrants by Land, Sea and Air.

³⁶³ Fernando Tocar, 1999. "Organized Crime and Laws of Exception", op. cit., p. 87-88.

been in existence for some time and are acting in concert to commit one or more a number of serious offenses or offenses established in accordance with this Convention to derive, directly or indirectly, a financial or other material benefit "³⁶⁴.

The first offense covered by this Convention is participation in a group organized for the purpose of committing serious offenses. The latter are defined in Article 2 (b), "any act constituting an offense punishable by deprivation of liberty, the maximum of which must not be less than four years"³⁶⁵. First, in order for the Convention to apply, a criminal group organized be involved in the commission of the offense. According to Article 2 (c): "the term " structured group " means a group which has not formed at random to commit an offense immediately and which does not necessarily have formally defined roles for its members , continuity in its composition or elaborate structure ". Even though this group is not random, it does not have to be a large, hierarchical criminal organization. It will be constituted, in accordance with the legal definition, as soon as it contains at least three persons who seek to derive directly or indirectly a financial or material benefit. The commission of at least one of the serious crimes defined in Articles 2, 5, 6, 8 and 23. This includes, in particular under Article 6, money laundering, the acquisition, the use or transfer of property³⁶⁶ of the proceeds of crime and the provision of assistance, assistance or advice for their commissions, etc. Finally, these offenses must, according to Article 3, be of a transnational nature and this is a key element of the Convention.

4.4.1.2. The constituent elements of organized crime

The offense is transnational or international if it is committed in more than one state; or when committed in one State but an interesting part of its preparation, planning, conduct or control takes place in another State; or if the offense is committed in one State but involves an organized criminal group that engages in criminal activity in more than one State; or if it has effects in more than one State³⁶⁷. Thus, for the Palermo Convention to apply, three conditions must be cumulatively fulfilled: (a) an offense established by it, (b) the offense is transnational, and (c) an organized criminal group is involved. The Palermo Convention, a genuine legal instrument for the fight against organized crime allows States to prevent and

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ According to Article 2 (d): "the term" property "means all types of property, tangible or intangible, movable or immovable, tangible or intangible, and legal acts or documents evidencing the ownership of the property. those assets or the rights therein ".

³⁶⁷ Article 3 (2. a, b, c, d).

punish such crimes by adopting in accordance with Article 5 (3), the necessary legislative measures to ensure that domestic law can cover all serious crimes involving organized crime groups.

4.4.2 The relationship between Terrorism and Organized Crime: The Complexity of Terrorist Financing Networks

Terrorism is a clandestine activity that requires very significant logistical and therefore financial means. Traditionally, however, unlike organized crime, terrorism is not about money, which makes it more difficult to dismantle its funding networks.

4.4.2.1. Financial links

Article 2 (a) of the Palermo Convention distinguished between the objectives of criminal organizations and terrorist organizations: the former aiming to "derive directly or indirectly a financial or material benefit" .A terrorist group has, moreover, as an attempt to destroy the institutions of a state or to impose its will on a state, it is a resort to violence or the threat of violence in order to spread terror in civil society and to weaken the authorities in place. In addition, no clandestine network is specific to terrorism; and illegal activities do not necessarily have the purpose of financing it.

Terrorist financing can indeed be made from fundraising or donations of money, acquired legally. Professor Jean-Paul Laborde pointed out that if a terrorist group uses the techniques of the organized criminal group and makes money and the search for huge profits its essential purpose, the offenses that it commits in this case fall within the scope of Convention. Thus, he says, "judges and prosecutors can use this convention against terrorist groups if they fund their activities through organized crime techniques"³⁶⁸. At the same time terrorist groups can become organized criminal groups when they seek resources to finance their activities through organized crime, corruption, money laundering, and that is why organized crime has close links with these networks.

Consequently, it is necessary for the fight against terrorism to attack organized crime in all its forms, and especially for money laundering, by establishing forms of coordination between the different countries so that this fight is international.

The adoption of international texts has the effect of pushing all states to criminalize or strengthen their domestic laws by extending the crimes underlying other serious crimes in

³⁶⁸ Jean-Paul Laborde, 2005. Rule of Law and Organized Crime: The Contribution of the United Nations Convention against Transnational Organized Crime, Dalloz , p. 153.

addition to drug trafficking³⁶⁹. Money can be used in these contexts to mount terrorist operations³⁷⁰. Monitoring and controlling financial flows can help break the connection between terrorism and its financing.

4.4.2.2. The common money laundering networks

The International Association of Penal Law has pointed out that "the sources that crime can launder are undoubtedly unlawful, unlike sources that support terrorism can be both illegal and lawful³⁷¹. In highlighting this point, it is important to have a provision on funding because it is impossible to criminalize lawful funding. It is known that there are official sources such as national or international public support for associations in the context of legal funding. There is, for example, in the UK or France a flow of money coming from Saudi Arabia to support the mosques whose presence and takeover in the territory are increasing. It is for this reason that some experts³⁷² argue that very technical measures must be adopted in a specific field of finance activity in order to curb money laundering and the financing of terrorism. This is a financial action by the bankers who must identify dangerous customers. This is a complex task, as the multiplication of financial products makes it difficult for the authorities in this area. Among the techniques that Ian Roberge proposes is the global or multi-level governance that is defined by the UN in the following ways in which individuals and institutions, public and private, manage their common challenges, an ongoing process of conflict resolution that allows for collaboration among actors despite the existence of conflicting interests. This involves formal institutions and regimes that have the power to enforce regulations, as well as informal arrangements that are perceived as being in their own interests, as individuals or institutions³⁷³.

³⁶⁹ Since the end of the 1980s, several multilateral initiatives have taken place, notably at the international level: the United Nations Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988 (Vienna Convention), and at regional level: the Council Convention of Europe No. 141 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, adopted on 8 November 1990 in Strasbourg, and European Directive 91/308 / EEC of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering.

³⁷⁰ See UN Convention for the Suppression of the Financing of Terrorism, adopted in New York.

³⁷¹ See the introduction of the International Seminar for the Young Penalist Section of the International Association of Penal Law, "Contemporary Perspectives on Terrorism", held in Noto, Italy, June 16 to 22, 2002.

³⁷² See Ian Roberge and Stanislav J. Kirschbaum, 2004. "How to curb the financing of terrorism? Multilevel governance in the world of high finance in Terrorism and international security, Bruylant, p.136

³⁷³ Ibid.

According to the economist³⁷⁴, one of the major challenges in the fight against money laundering exists in the difficulty of identifying the owner of financial assets, not to mention the problems related to tax evasion or so-called "Tax havens" where banking laws are often ambiguous. It is also difficult to determine common money laundering networks. But these difficulties did not prevent the governments to freeze, after the attacks of September 11th, the assets of various groups suspected of terrorism. Thus the FATF (International Financial Action Task Force) received the mandate to develop standards and an action plan to fight the financing of terrorism.

The relationship between money laundering and the financing of terrorism on the one hand, and organized crime and terrorist attacks on the other hand are very complex. Money laundering, in legal terms, is the conversion or transfer of capital or other property for the purpose of concealing or disguising their illicit origin or assisting anyone who is involved in the realization of the offense from which these assets and assets originate to escape the legal consequences of its actions and that organized crime, according to the Palermo Convention, seeks to derive directly or indirectly a financial or other advantage material. Terrorism remains an act intended to kill or seriously injure a civilian or any other person who does not contributed directly in hostilities in a situation of armed conflict where by its nature or context such act is intended to threaten a population or to force a government or an international organization to perform or refrain from performing any act³⁷⁵.

4.5 The qualifications of international courts

Several contemporary scholar and criminalists experts³⁷⁶ describe terrorist acts as crimes against humanity. They assert that this concept as well as its qualification appeared for the first time in the Allied Agreement of August 8, 1945³⁷⁷. Article 6 (c) of the Statute of the Military Tribunal at Nuremberg, which gave the first definition of crimes against humanity and described as "murder, extermination, and all other inhumane acts committed against all civilian populations before or during the war, or persecutions on political, racial or religious

³⁷⁴ See "Finance and Economics, 2002. Shell Games: Money Laundering," The Economist, October 26, 2002.

³⁷⁵ Article 2 (b) of the International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 10 January 2000, op. cit.

³⁷⁶ Nasser Zakar , 2001, "Analytical Approach to Crime Against Humanity in International Law", RGDIP, No. 2, p. 282-305.

³⁷⁷ See the annex to the Agreement on the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, signed at London on August 8, 1945, in United Nations Treaty Series, p.251

grounds when such acts or persecution whether or not they constituted a violation of the domestic law of the country in which they were perpetrated "³⁷⁸.

The concept of crime against humanity appeared again when the General Assembly of the United Nations adopted the Convention on the Prevention and Punishment of Genocide adopted in 1948. Crimes against humanity are related to international regulations and are characterized by serious violations of the rules formulated in international conventions. These acts are of a serious nature, as the Judgment of 14 January 2000 of the Second Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia emphasizes³⁷⁹.

The question that now needs to be addressed is whether certain acts of terrorism can be described as crimes against humanity, and if they are therefore within the jurisdiction of the International Criminal Court. On the other hand, we will analyze the qualification of the assassination of the former Lebanese Prime Minister Rafiq Hariri (February 2005), elaborated by the Security Council and the Lebanese government, in the Statute of the Special Tribunal for Lebanon (STL) in May 2007.

4.6 Qualifications of the Military Criminal Court of Nuremberg and other International Criminal Tribunal

According to the statute of the Nuremberg Military Criminal Court, the general elements

The crimes against humanity are the same as those for ordinary crimes; the *actus reus* and the *mens rea*. According to its sixth article³⁸⁰, a crime against humanity is a crime that violates international conventions and laws and is at the same time condemned by all States. Indeed, all states have progressively integrated crimes against humanity into their domestic law, and all international criminal tribunals have also recognized it as an independent crime³⁸¹.

The *actus reus* element is characterized by the contempt of the civilian population by their freedom and their bodily integrity through serious, systematic and organized attacks against people and property. The *mens rea* (intentional) element of these crimes, which can be committed against civilian populations depend on, as confirmed by Nasser ZAKAR³⁸², the execution of a state plan or a policy of the organization. It is in fact the motive that is

³⁷⁸ Elizabeth Zoller, 1993, "Defining Crimes Against Humanity," Journal of International Law, No. 3, p. 549-558.

³⁷⁹ ICTY, 14 January 2000, Kupreskic and Consorts, aff. IT-95-16-T, See also Nasser Zakar, "Analytical Approach to Crime Against Humanity in International Law, op. cit., p. 282.

³⁸⁰ Article 6 (C) of the Statute of the Nuremberg Military Criminal Court.

³⁸¹ The Statutes of the International Criminal Tribunals for the former Yugoslavia (resolution S / RES / 827 of 27 May 1993) and Rwanda (resolution S / RES / 955 of 8 November 1994) also have jurisdiction to hear the crime.

³⁸² Nasser Zakar, 2001. Analytical Approach to Crime Against Humanity in International Law, op. cit., p. 289-290.

different in common law crimes and crimes against humanity³⁸³. It states that it is inconceivable that the agent of the crime against humanity does not have the will to hurt and the conscience of the unlawful character of the crimes which it advocates, provokes or executes. Thus, the perpetrator of such a crime must be aware of the existence of an attack against a civilian population and be aware that its act falls within the scope of the latter even if it is not informed all the details. To this end, Nasser Zakar emphasized that "movable intent" is one of its constituent elements that determines the definition and conditions the repression of the crime against humanity. The question is to what extent terrorist acts can be characterized as crimes against humanity. To answer this question, we first need to determine the legal aspects of the crime against humanity and then analyze the possible characterization of terrorist attacks as crimes against humanity.

4.7 The legal aspects of the attack constituting crime against humanity in international law

Article 6 (C) of the Statute of the Nuremberg International Military Tribunal requires that Victims of crimes against humanity are civilian populations attacked before or during armed conflict, and have been persecuted for political, racial or religious reasons. These elements have been taken up by the International Criminal Tribunal for the former Yugoslavia, which has adopted its own definition of crimes against humanity. According to article 5 of its Statute: *"The International Criminal Tribunal for the former Yugoslavia has the power to try persons presumed responsible for the following crimes when they have been committed during an armed conflict of an international or internal character and directed against any civilian population: murder, extermination, enslavement, expulsion, imprisonment, torture, rape, persecutions on political, racial or religious grounds (...)"*³⁸⁴.

According to this definition, there is a link between crime against humanity and armed conflict. However, the *Tadic* judgment of the Appeals Chamber of the ICTY of 2 October 1995 provided some legal clarification regarding the existence of an armed conflict, so that such crimes can be committed outside of hostilities against civilian populations. This will be discussing in the following sections³⁸⁵.

³⁸³ Ibid.

³⁸⁴ Ibid.

³⁸⁵ ICTY, 2 October 1995, Prosecutor v. Dusko Tadic, Judgment No. IT-94-1, para. 66-70,

4.7.1. The exclusion of the condition of armed conflict

After reviewing the principle of the requirement of an armed conflict, the ICTY Appeals Chamber in *Tadic* decided that it was not essential that a link be established between the concept of crimes against humanity and armed conflict³⁸⁶. This jurisprudential interpretation may open the possibility of repression of crimes against humanity not only by the ICTY but also by the ICC. It is no longer legally necessary for crimes against humanity to be committed on the geographical scope of armed conflict³⁸⁷. They may be committed outside the geographical and temporal framework of the armed conflict, as for example in the territory of the Parties to the conflict. It remains essential, according to the preceding definitions that they should be directed against a civilian population, whether in peacetime or in time of war. The Appeals Chamber concluded that customary international law no longer requires a link between crimes against humanity and armed conflict³⁸⁸.

4.7.2. Systematic attack against the civilian population

The ICTY held in *Prosecutor v. Dragan Nikolic*³⁸⁹ of 12 February 1999 that to be directed against a civilian population, a crime against humanity must fulfil three criteria;

First, these criminal acts must have as their object a civilian population specifically identified as a group by the perpetrators of those acts; Secondly, these criminal acts must be part of a certain organization and have a systematic character; finally, their commission must be of a certain size and seriousness.

It must be stated that, on the one hand, all of these criteria do not specify what specific character this group must present and that, on the other hand, the concept of crime against humanity initially defined by the Nuremberg Tribunal has evolved through the jurisprudence

³⁸⁶ According to the ICTY Appeals Chamber, paragraph 68, The Geneva Conventions remain silent on the geographical frame of international "armed conflicts", but the provisions suggest that at least some of the clauses of such Conventions apply to the entire territory of the States parties to the conflict and not just in the vicinity of actual hostilities. Undeniably, some of the provisions are clearly linked to hostilities and the geographical scope of these provisions should be limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not similarly restricted. With regard to prisoners of war, the Convention applies to combatants in the hands of the enemy; it makes no difference that they are interned near hostilities. In the same spirit, the Geneva Convention IV protects civilians throughout the territory of the Parties (...). ICTY, 2 October 1995, *Prosecutor v. Dusko Tadic*, Judgment No. IT-94-1, para. 66-70.

³⁸⁷ Ibid.

³⁸⁸ According to paragraph 69 of the Appeals Chamber, this interpretation manifests itself in the fact that the beneficiaries of common Article 3 to the Geneva Conventions are those who do not participate directly (or no longer directly) in hostilities. This shows that the rules in common Article 3 also apply outside the narrow geographical context of the actual theatre of combat. Also according to the paragraph 140-141 the absence of a link between crimes against humanity and an international armed conflict is now an established rule of customary international law". See also Yann Jurovics and Brigitte Stern, 2002, *Reflections on the specificity of crime against humanity*, LGDJ, Paris, p.525 .

³⁸⁹ ICTY, 12 February 1999, *The Prosecutor v. Dragan Nikolic*, aff. No. : IT-94-2-R61, para. 15.

of the International Criminal Tribunal. Article 3 of the Statute of the International Criminal Tribunal for Rwanda, charged with prosecuting persons responsible for acts of genocide and other serious violations of international humanitarian law committed on the territory of Rwanda or by Rwandan citizens in the territory of Rwanda States between 1 January and 31 December 1994, stipulates that crimes against humanity must be committed as part of a widespread and systematic attack directed against any civilian population because of its national affiliation political, ethnic, racial or religious. Unlike the statute of the ICTY, the ICTR Statute does not require in the definition of the *actus rea* of crime against humanity the existence of what is called a "policy of ideological hegemony", provided for by the Statute of the Tribunal Nuremberg, nor the condition of an "armed conflict" provided for by the Statute of the ICTY.

The Statute of the ICTR only requires that acts be committed as part of an attack directed against a civilian population and this attack tends to terrorize the civilian population. The *Kunarac* judgment defines the attack as a course of action involving the commission of acts of violence that can vary greatly in nature and gravity while producing enormous terror³⁹⁰.

As the terrorist attacks were characterized, on the one hand, by the use of violence, terror and organized crime by groups or movements of state or non-state against the civilian population for political purposes and on the other hand, through the intentional use of explosives and other deadly devices in a public place, causing the death of innocent civilians or serious bodily harm³⁹¹. Some scholars and internationalists such as President Gilbert Guillaume have argued in this regard that large-scale terrorist attacks against civilian populations could be regarded as crimes against humanity³⁹².

4.8 Serious terrorist attacks classified as crimes against humanity

For Marie Robinson, United Nations High Commissioner for Human Rights, the general categorisation that best fits the acts of 9/11 is that of crimes against humanity³⁹³. However,

³⁹⁰ ICTY, 22 February 2001, Prosecutor v. Dragoljub Kunarac, case no. No. : IT-96-23-T, para. 415-419, a course of conduct involving the commission of acts of violence.

³⁹¹ See Andre Donneur, Stephane Roussel and Valentin Chirica, 2004. "The Consequences of the September 11 Events on the Autonomy of Canadian Foreign Policy: Security Measures and the New Anti-Terrorism Legislation", in Stanislav J. Kirschbaum, 2004. Terrorism and international security, op. cit., p.177.

³⁹² See Gilbert Guillaume, 2003, The International Court of Justice at the dawn of the twenty-first century: the eyes of a judge, ed. A. Pedone, Paris, p. 255-259.

³⁹³ UN Press release, 25 September 2001.

this classification has been criticized by some internationalist specialists. In the following section these arguments will be further explained³⁹⁴.

4.8.1. Legal aspects of this classification

Professor Brigitte Stern³⁹⁵ supported the characterization of terrorist attacks as crimes against humanity. She stressed that "the three elements of the ICTY's *Nikolic* judgment, which is considered as stating current customary international law in this area, are indeed present: they must be particularly serious acts directed against a civilian population, and committed in a systematic or generalized manner. These elements are in fact included in Article 7 of the Statute of the International Criminal Court, which refers to a whole series of inhumane acts committed in the context of a widespread or systematic attack against a civilian population and in knowledge of this attack³⁹⁶". The President Gilbert Guillaume, meanwhile, clarified that even if the crime of terrorism does not come as such within the jurisdiction of the ICC, this would not prevent this Court from knowing acts of terrorism that would be qualified under its Statute, namely genocide, crimes against humanity and certain war crimes. However, how can terrorism be characterized as a crime against humanity, when it could not be constituted as an independent crime? The Rome Convention covers certain war crimes and not terrorism, distinguishing between offenses committed in cases of international armed conflict and those identified during armed conflicts that do not represent such a character. To the extent that acts of terrorism fall within these characterisations, the International Criminal Court would be competent to know and punish them. In this regard, President Guillaume stated that: *"In this perspective, the judge has a prominent role to play whether it is the national judge or the international judge, in the service of the common good; it must contribute to the fight against terrorism. It must also ensure that this struggle is conducted in accordance with the law and civil peace and peace between nations are indivisible from justice"*³⁹⁷.

4.8.2. The constituent elements of this qualification

Herve Ascensio rejected the hypothesis that one or more attacks constitute a widespread or systematic attack on a civilian population. According to his point of view; "the terrorist act is characterized above all by its singularity from which it draws the essential its symbolic

³⁹⁴ Herve Ascensio, 2000. "Terrorism and International Jurisdictions", in *New Threats to International Peace and Security*, op. cit., p. 280.

³⁹⁵ Brigitte Stern, 2001; what international legal responsibilities? in *Freedom, Justice, Tolerance, Mixtures in Honor of Dean Gerard Cohen*, op. cit., p. 1472-1473.

³⁹⁶ Elizabeth Zoller, 1993, "The Defined Crimes Against Humanity", *Journal of International Law*, No. 3 of July 1993, p. 249-268.

³⁹⁷ Ibid.

strength without the singular character of the event. The terrorist act will no longer appear as a challenge from the oppressed to the powerful; it will no longer be an asymmetrical violence but a conflict between powers³⁹⁸. However, the question is not terrorism a systematic violent attack on innocent civilians? Is it not the terrorist offense a widespread attack that threatens international security and the stability of international relations?

The terrorist acts covered are generally aimed at civilians who do not participate directly in hostilities. They constitute a violation of the principle that the civilian population must be spared from hostilities, a principle recognized as one of the fundamental principles of humanitarian law. Terror has also been taken into account in criminalizing crimes against humanity. In the *Krstic* case in particular, the terror imposed on the civilian population made it possible to establish the forced nature of the transfer of this people out of Srebrenica³⁹⁹. As the terrorist attacks are based on the systematic use of violence that generalizes a situation of insecurity, and as they are characterized by what constitutes essentially the *actus rea* covered by the definition of crimes against humanity provided for in Article 7 of the Rome Statute of the International Criminal Court. A crime committed in the context of a widespread or systematic attack against a civilian population, they may be characterized as crimes against humanity and therefore they fall within the jurisdiction of the ICC as claimed by several internationalists and criminalists⁴⁰⁰.

However, William A. Schabas and Clementine Olivier claim that the mere fact that terrorist acts constitute widespread or systematic attacks, of which the victims are civilians, is not sufficient to qualify them as crimes against humanity⁴⁰¹. They point out that the concept of crimes against humanity necessarily involved, and until recently, some form of state intervention. However, it can be considered that this condition was changed as early as 1997, when the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia argued that crimes against humanity require a policy of a government, organization or of a group rather than the closer involvement of a state policy⁴⁰². More recently, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has asserted that

³⁹⁸ Herve Ascensio, 2000. "Terrorism and International Jurisdictions", in *New Threats to International Peace and Security*, op. cit., p. 280.

³⁹⁹ ICTY, 2 August 2001, *Prosecutor v. Radislav Krstic*, case no. No. IT-98-33, para. 41, 517 and 607.

⁴⁰⁰ Among the Lawyers and the legal experts who called the attacks of September 11, 2001 as crimes against humanity, one can quote the London lawyer Geoffrey Robertson, *The Times*, September 18, 2001, p. 18; the French academic lawyer Alain Pellet, *Le Monde*, 21 September 2001, p. 18; Professor Cherif Bassiouni Assiouni, 2001 "Legal Control of International Terrorism: A Policy-Oriented Assessment," *Harvard Int. L.J.* No. 43, 2002, p. 83; Antonio Cassese, 2001, "Terrorism Is Also Disputing Some Crucial Legal Categories of International Law," *European Journal of International Law*, No. 12, p. 993-995.

⁴⁰¹ William A. Schabas and Clementine Olivier, 2004. *Terrorism: crime against humanity*, op. cit., p. 380-384.

⁴⁰² ICTY, 7 May 1997, *The Prosecutor v. Dusko Tadic*, aff. No. IT-94-1-T, para. 645.

the existence of a state plan or policy is not necessary to qualify an act as a crime against humanity⁴⁰³.

Regarding the notion of "generalised attack", it was defined by Article 7 (2) of the Rome Statute as *"the conduct which consists in the multiple knowledge of acts referred to in paragraph 1, and against any civilian population in pursuance or in the pursuit of the policy of a state or organization for the purpose of such an attack"*⁴⁰⁴. This definition can cover the terrorist attacks, because it must be understood not only the geographical field but especially the number of deaths and this criterion is inspired by the practice of the ad hoc tribunals in the *Tadic* case. It was stated that: *"crimes against humanity may be committed on behalf of entities exercising de facto control over a particular territory but without the international recognition or official legal status of a de jure State, or by a group or a terrorist organization"*⁴⁰⁵.

In the *Erdemovic* case, the ICTY had already stated that the person prosecuted must have participated in "a widespread and systematic attack against a relatively large group"⁴⁰⁶. The adjective "systematic" would imply the implementation of a methodical, thoughtful, orchestrated and organized plan. In the *Kayishema* case⁴⁰⁷, the ICTR had already clarified the meaning to be given to the adjectives characterizing the attack, it declared that a "generalised attack is characterized by the fact that it is directed against a plurality of victims. A systematic attack, an attack perpetrated under a preconceived policy or plan. In the Vukovar Hospital case, the ICTY stated that "to the extent that it is related to the widespread or systematic attack against a civilian population, a single act could fulfil the conditions of a crime against humanity"⁴⁰⁸.

A single act can therefore also be characterized as a crime against humanity, even if it does not present the characteristics of generality and systematic but only the other characteristics of the crime (intentionality, discriminatory character). In spite of the few criticisms made, article 7 of the ICC constitutes in its complete content an important step in the definition of the crime against humanity, as Nasser Zakar pointed out, which gives the following definition: "is a crime against humanity, any breach of international law committed against a

⁴⁰³ ICTY, 12 June 2002, *The Prosecutor v. Dragoljub Dusko, Radomir Kovac and Zoran Vukovic*, aff. No. IT-96-23, para. 98.

⁴⁰⁴ Article 7 (2) of the Rome Statute.

⁴⁰⁵ ICTY, 7 May 1997, *The Prosecutor v. Dusko Tadic*, op. cit., para. 645.

⁴⁰⁶ ICTY, 7 October 1997, *The Prosecutor v. Drazen Erdemovic*, aff. IT-96-22.

⁴⁰⁷ ICTR, 9 April 1997, *The Prosecutor v. Kayishema Clement*, aff. No. ICTR-95-1.

⁴⁰⁸ ICTY, 27 September 2007, *The Prosecutor v. Mile Mrksic, Miroslav Radic and Veselin Sljivancanin*, aff. IT-95-13 / 1-T.

group of persons in a systematic and generalized manner with the motive of attacking the human person in execution of a policy that transcends the rules of international law "⁴⁰⁹.

Crimes against humanity appear to be able to cover the terrorist attacks, because according to the ICTY: "crimes against humanity cover serious acts of violence that harm the human being or reach him in what is most essential to him: his life, freedom, integrity, health and his dignity. They are inhumane acts which in their magnitude or seriousness exceed the limits tolerable by the international community which must enforce the sanction "⁴¹⁰.

The crime against humanity no longer appears to be linked to the existence of an armed conflict, which brings it closer to organized terrorist criminal acts that can be perpetrated in peacetime as well as in war against civilians and endanger their lives, their property and their freedoms⁴¹¹.

4.9 The characterization of terrorism and the Special Tribunal for Lebanon (STL)

At present, the Hariri Case constitutes a working pathway for the Security Council which may allow for the legal qualification of a terrorist attack perpetrated in Lebanon on 14 February 2005. This is evidenced by the work of the International Commission of Inquiry (ICI) on the assassination of former Lebanese Prime Minister Rafiq Hariri and 22 others, as well as the trial of the next International Criminal Court which should evoke the concept of terrorism. This is the first time that an international commission of inquiry has been set up to investigate a terrorist attack perpetrated in Lebanon in order to prosecute the perpetrators and help the Lebanese authorities to investigate all aspects of this terrorist act, including the identification of perpetrators, sponsors, organizers and accomplices ⁴¹².

⁴⁰⁹ Nasser Zakar, 2001. "Analytical Approach to the Crime of Humanity in International Law", op. cit., p. 304.

⁴¹⁰ ICTR, 23 August 2003, the Prosecutor v. Jean Kamhanda, aff. No. ICTR-99-54A-T.

⁴¹¹ Mauro Politi, 1999. "The Rome Statute of the International Criminal Court: the point of view of a negotiator", RGDIP, No. 4, p. 817-850.

⁴¹² See resolution 1595 (2005) unanimously adopted by the Security Council on April 7, 2005. It should be noted that Lebanese Prime Minister Rafiq Hariri was the president of the Future Movement and a very active member of the Lebanese anti-Syrian opposition in Lebanon. He was against the presence of Syrian troops on the Lebanese territories, and against the domination of Lebanon by Syria. The UN fact-finding mission considered that the Syrian government is primarily responsible for the political tensions that preceded the assassination of former Prime Minister Rafiq Hariri. Indeed, the Syrian Government clearly exerted an influence that went beyond what can reasonably be expected from relations of cooperation and good neighbourliness. He was ingrained in the administration of Lebanon at a level of detail and with brutality and inflexibility which are the main reason for the political polarization that followed. See Report S / 2005/203, p. 20, para. 61-62.

4.9.1 The characterization of the attacks in the STL Statute

On 30 May 2007, the Security Council adopted resolution 1757 (2007), which entered into force on 10 June of the same year, on the establishment of a Special Tribunal for Lebanon (STL) to try perpetrators of attacks in Lebanon since 2005 including the killers of former Lebanese Prime Minister Rafiq Hariri assassinated on February 14, 2005. This resolution reflects the agreement between the Lebanese government and the United Nations. The legally-binding text provides that the tribunal "will start operating at a date to be determined by the UN General Secretary in consultation with the Government of Lebanon, and taking into account the progress of the international investigation commission's work. An agreement for establishing it was signed in 2006⁴¹³ between the UN and the Lebanese government, but its ratification by the Parliament of Beirut, required by the Lebanese Constitution, could not take place because of the political crisis in Lebanon⁴¹⁴. The resolution also provides for the case where an agreement between the UN, Lebanon and a host country on the seat of the tribunal would be impossible. In this case, the Council decides that the seat of the tribunal will be the subject of an agreement between the UN and the host country, in consultation with the Government of Lebanon. The tribunal would be composed of three judges, one Lebanese and two foreigners. The prosecutor would also be a foreigner, but assisted by a Lebanese deputy. A court of appeal should be founded and composed of two Lebanese judges and three foreigners. Non-Lebanese magistrates would be appointed by the Secretary-General of the United Nations. The court for reasons of security and serenity should sit outside Lebanon.

4.9.1.1. The description of the attacks committed in Lebanon

With regard to international anti-terrorist law, the adoption of the STL on the basis of Chapter VII by the Security Council confirms the UN's characterization of terrorism as a real threat to international peace and security⁴¹⁵. According to the definition often quoted by Jean Combacau: "*[a] threat to peace within the meaning of Article 39 is a situation which the body competent to launch a sanctions action declares that it actually threatens peace*"⁴¹⁶. The

⁴¹³ See Resolution 1664 (2006), adopted by the Security Council on 29 March 2006 at its 5401st meeting, S / RES / 1664 (2006).

⁴¹⁴ Lebanese President Emile Lahoud considered the government of Fouad Siniora "illegitimate" after the resignation of Shiite ministers, while the speaker of Parliament, Nabih Berri, another opposition figure, refused to summon the Chamber to allow the continuation of the ratification process.

⁴¹⁵ Simeon Karagiannis, 2011. "Legislation of illegal situations in international law. The example of the illegal use of force", in Ben Achour and Slim Laghmani (eds.), International Law at a Crossroads. Strength of Law and the Law of Force, op. cit., p. 105-136.

⁴¹⁶ Jean Combacau, 1974. The power of sanction of the UN, theoretical study of non-military coercion, A. Pedone, Paris, p. 10.

Security Council is the competent organ of the World Organization declared in resolutions 1368 and 1373 that terrorist acts constitute a threat to international peace and security.

The status of the STL, which came into effect on June 10, 2007, aims to establish the responsibilities of those who used terror as an instrument of intimidation of the Lebanese people and destabilization of their government. The very special jurisdiction of this internationalized national court⁴¹⁷ calls for a preliminary remark. According to article 1 of the draft statute, it deals mainly with the crime of 14 February 2005, which is described as "terrorist" in the preamble and also on other crimes committed between 1 October 2004 and 31 December 2007. It could even relate to crimes committed later if there was a consensus on them between the Lebanese government and the Security Council.

The STL is therefore competent to try terrorist crimes perpetrated only in Lebanon. He could prosecute state agents from neighbouring countries if they were involved in the attacks in Lebanon since the assassination of former Prime Minister Rafiq Hariri. However, on the contrary, he could not judge terrorist crimes perpetrated outside Lebanese territory, for example in Iraq. The legal advance of the STL treaty resides first and foremost in the fact of bilaterality, that is to say that this International Criminal Tribunal entered into force on June 10, 2007, while its text (very binding based on the foundation of the Chapter VII of the Charter) does not oblige Lebanon to ratify it and is not open to adoption by other states, particularly Lebanon's neighbouring states some of whose nationals may be involved in the assassination of Prime Minister Rafiq Hariri. In general, ratification will take place in accordance with the law of treaties if it is provided for in the treaty. In this case, ratification is an indispensable condition for the entry into force of the treaty. It is therefore not a mere formality but an act of essential importance.⁴¹⁸ This provision offers the Lebanese parties a new opportunity to reach an agreement by following the ordinary Lebanese procedures for ratifying the international treaty represented by the agreement between Lebanon and the UN.

⁴¹⁷ The STL is the first international criminal court competent to try acts of terrorism. The ICC does not have jurisdiction in this area because terrorism crimes are not included in its statute. The ICTY, for example, was responsible for trying crimes committed in the former Yugoslavia. On 13 February 1995 it published several indictments. For the first time they concern not an individual but an entire group of Serbs responsible for atrocity in or around the Omarska death camp.

⁴¹⁸ ICJ, Judgment of July 1, 1952, *Ambatielos Case* (Greece C. United Kingdom), Reports 1952, p. 43.

4.9.1.2. The Agreement between Lebanon and the United Nations

The second legal exclusivity is the development of a treaty annexed to a resolution adopted by the Security Council. The Resolution 1757 (2007) includes in its annex the Statute establishing the STL. The question that arises here is whether this treaty is legally valid in international law. There is no rule of international law prohibiting a text annexed to a resolution or a joint statement from constituting international agreements intended to submit a dispute to arbitration or judicial settlement⁴¹⁹. Unlike the ad hoc international criminal tribunals (ICC), which have been established through unilateral acts of mandatory scope and by decisions of the Security Council pursuant to Chapter VII of the United Nations Charters⁴²⁰ of the so-called "hybrid" or "mixed" STL needed Lebanon's agreement to enter into force. That is to say, this bilateral agreement requires the consent and ratification of Lebanon. However, the Statute of the STL has not been ratified by the Lebanese Parliament because of the political conflict between the pro-Syrian Lebanese opposition and the parliamentary majority. This question focuses on the nature of the STL.

We recognize that the ratification of treaties is governed by domestic law. The Lebanese internationalist Aida Azar noted: "It is difficult to see how one could ask a State to which the Tribunal has been compelled to participate in its composition and to join the trial"⁴²¹. As the status of the STL was blocked by the opposition and President Lahoud, the Security Council following the request of the Lebanese Prime Minister Fouad Seniora and the deputies of the parliamentary majority to overcome this block adopted the status of the STL under Chapter VII of the Charter by Resolution 1757 of 30 May 2007. This UN desire reflects not only the internationalization of the United Nations global counter-terrorism strategy, but its resolve to end violence and terrorist attacks in Lebanon. Aida Azar stated that "by the resolution 1757, the Security Council substitutes an international procedure for an internal procedure; more exactly, it replaces a law of ratification by a resolution of the political organ of the United Nations"⁴²². In this framework of application and to strengthen regional criminal law cooperation, the STL statute provides that supplementary agreements may be concluded.

⁴¹⁹ See Articles 2, 3 and 11 of the Vienna Convention on the Law of Treaties, adopted at Vienna on 23 May 1969, and entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, p. 331.

⁴²⁰ See Pierre-Marie Dupuy, 2000. Public International Law, Dalloz, Paris, p. 489.

⁴²¹ See Aida Azar, 2007. "The Special Tribunal for Lebanon: an original experience? », Op. cit., p.648.

⁴²² Ibid.

4.9.2 The framework of the STL as an international anti-terrorist court with a mixed jurisdiction

The Security Council has described the systematic attacks committed in Lebanon as acts of international terrorism. The assassination of Lebanese Prime Minister Rafiq Hariri was also the subject of this qualification elaborated in the Statute of the Special Tribunal for Lebanon (STL)⁴²³. These acts of terrorism threaten the stability of Lebanese society, the security of the Lebanese Republic, and the lives of citizens. Such acts present a degree of seriousness, violence and terror. The UN wanted to put an end to this worrying situation in Lebanon by the internationalisation of the STL and its composition.

The internationalization of the STL is not only reflected in the composition of Chambers and the participation of foreign judges. This internationalized cooperation is in addition to the cooperation already specified by the statute of the STL, with all the organs of the Special Court at all stages of the proceedings. It also facilitates the access of the Prosecutor and the Defence Counsel to the places, persons and documents they need for the purposes of investigations⁴²⁴. This judicial cooperation goes hand in hand with international financial cooperation aimed at financing the STL, since fifty-one per cent of the Tribunal's expenses are financed by voluntary contributions from States⁴²⁵.

The status of the STL provides for a majority of international judges to which the Trial and Appeal Chambers will consist of more than fourteen independent judges. The Trial Chamber will consist of a Lebanese judge and two international judges. If the STL is led to have a second Trial Chamber, it will be composed of the same way⁴²⁶. Regarding the Appeals Chamber, it will be composed of five judges: two Lebanese and three international. International judges shall be selected by the Secretary-General of the United Nations from among judges who have exercised their functions independently and do not accept or seek instructions from any government or any other source. Their term of office is three years renewable after consultation with the Government of Lebanon⁴²⁷. Also the Prosecutor will be appointed by the Secretary-General and a Lebanese Deputy Prosecutor to assist the

⁴²³ See the resolution 1757 (2007), op. cit.

⁴²⁴ Art. 15, S 1.

⁴²⁵ Art. 15, S 1-b.

⁴²⁶ See the "Agreement between the United Nations and the Republic of Lebanon on the Establishment of a Special Tribunal for Lebanon", annexed to resolution 1757 (2007), p. 4-22.

⁴²⁷ Ibid.

Prosecutor in the conduct of investigations and prosecutions. It must be noted that the STL is an internationalized mixed jurisdiction and applying the Lebanese criminal code⁴²⁸.

4.9.3 The definition of terrorism as an international crime by the STL

As previously discussed in chapter two, it is difficult and complicated to draw a general definition of terrorism in international law⁴²⁹. However, on 16 February 2011, the STL Appeals Chamber issued, at the request of the Pre-Trial Judge, a preliminary ruling on the applicable law in which it affirmed the existence of a customary international definition of terrorism⁴³⁰. To be able to rely on case law supporting its view of the definition of terrorism, it remained to justify its inclusion in the decision of the Appeals Chamber of the STL. Article 2 of the Statute clearly states that the law applicable to the Tribunal is limited to the Lebanese Criminal Code and its national definition of terrorism. How then to take into account a definition of customary international law?

This issue had been raised by the Pre-Trial Judge in his order for preliminary rulings. Noting the tension between national law and international law that runs through the STL's Statute, the STL wonders whether "the Tribunal must also take into account relevant international law"⁴³¹. This tension would be apparent in view of the international character of the Tribunal, who's Statute contains aspects of international criminal law. Noting that its mission is to apply the Lebanese Criminal Code as the Lebanese courts the Chamber begins by setting out the principles of interpretation relating to Lebanese law. To interpret the provisions of the Lebanese Criminal Code as the Lebanese courts would is to take into account the international law that is binding on Lebanon". Although Lebanese law does not mention the application of customary international law, the Chamber considers that the latter "must necessarily play a role within the Lebanese legal system"⁴³². Relying on some Lebanese decisions referring to customary international law, the Chamber concludes that; where it is directly applicable, custom may implicitly modify Lebanese law⁴³³. At this stage, therefore, it can be concluded that international law cannot be directly applied by the STL, but can

⁴²⁸ Section I Jurisdiction and applicable law, Article 2 Applicable criminal law.

⁴²⁹ See Cherif Bassiouni, 2004. "Terrorism: The Persistent Dilemma of Legitimacy," Case Western Reserve Journal of International Law (WJInt'l Case L.), 35 (2-3), p. 305;

⁴³⁰ STL, Appeals Chamber, Preliminary ruling on the applicable law: Terrorism, conspiracy, homicide, commission, qualification contest, STL-11-01 / 1, 16 February 2011, p. 56, § 85.

⁴³¹ STL, Pre-Trial Judge, "Order on Preliminary Motions to Judges of the Appeals Chamber pursuant to Rule 68 (g) of the Rules of Procedure and Evidence", STL-11-01- I21 January 2011, § 6.

⁴³² Ibid.

⁴³³ Ibid.

nonetheless be used as an interpretative aid insofar as it is part of the context of Lebanese law.

Effectively, interpreting Lebanese law under customary international law broadens Lebanon's definition of terrorism. Article 314 of the Penal Code may, indeed, appear rather restrictive in so far as it enumerates the means likely to be used for an act to be considered as terrorist:

*Are included in the term acts of terrorism any facts whose purpose is to create a state of alarm, which will have been committed by means likely to produce a common danger, such as explosive devices, flammable materials, toxic or corrosive products infectious or microbial agents*⁴³⁴.

The Lebanese courts have traditionally apprehended this enumeration in a restrictive manner. As a result, an act committed with a firearm could not be considered a terrorist act. Not containing such restrictions, the international definition makes it possible to overcome this limitation. Indeed, the literal reading of Article 314 of the Lebanese Penal Code does not confirm the restrictive approach. According to the Chamber, emphasis should be placed on the words "means likely to create a common danger" which are central to the establishment of the "tools" likely to be used to commit a terrorist act⁴³⁵. The use of a firearm in the street is just as likely to put others at risk as the explosive is. It can also be added that the word "such", which precedes the enumeration, tends to demonstrate its illustrative and non-limiting nature.

The Chamber takes the extensive interpretation a step further by linking the purpose of the act - "creating a state of alarm" - with the result of the means used - creating "a common danger". It argues, therefore, that attacking a person of a single size at home is also likely to create a common danger because of the violent reactions that this act could cause in the population⁴³⁶. The problem is, however, that in this approach it is the act and no longer the means as such that is likely to create a common danger. However, considering the structure of the sentence, "likely to create a common danger" is the description of "average"; it characterizes the nature of the object or the use that is made of it.

The extent to which this definition addresses the issues that hinder the establishment of a single definition of terrorism, namely: the issue of freedom fighters, wartime terrorism and terrorism, needs to be examined. With the exception of this last point, the preliminary ruling addresses all of them directly, but quickly dismisses the controversies they contain. With

⁴³⁴ Article 314 of the Lebanese Penal Code.

⁴³⁵ STL, Appeals Chamber, "Preliminary ruling", cited above, p. 91, § 126

⁴³⁶ STL, Appeals Chamber, "Preliminary ruling", cited above, p. 91, § 127.

regard to freedom fighters, the great difficulty is the willingness of some states to include a reference to the legitimate struggle of peoples for independence and freedom and in this way distinguish terrorism from other forms of political violence⁴³⁷. In this regard, the Chamber considers that a sufficiently generalized agreement has emerged since even the States that hold this distinction have ratified texts - in particular the Convention on the Suppression of the Financing of Terrorism⁴³⁸ which do not mention the legitimate struggle of certain peoples⁴³⁹. "States that still insist that an exception be made to" freedom fighters "and that therefore object to the international definition of terrorism may at best be considered as persistent objectors⁴⁴⁰.

After all, it is accepted that "the interests of the international community tend to prevail over those of individual sovereign states⁴⁴¹. Another obstacle to the adoption of the General Convention on Terrorism concerns the extension of its scope, including acts perpetrated during wartime⁴⁴². The STL considers, on this point, that "a customary rule, which also covers terrorism in times of armed conflict, is in the making", the definition it has emerged applying only in times of peace. We can see that the Chamber is indeed seeking to resolve certain controversies and to highlight the elements on which the positions of the States are ultimately not so far apart.

4.10 Conclusion

The terrorist offense remains at present an unspecific crime under international law despite the existence of several global conventions on counter-terrorism. Terrorism is a serious crime and it is exercised by transnational anti-state groups that often target civilian populations and government institutions. The definition of armed aggression refers to acts of terrorism acting on behalf of an aggressor State under its control against the territory, property, civilian population or members of the diplomatic staff of another State.

⁴³⁷ See Boaz Ganor, 2002, "Defining Terrorism: Is One Man's Terrorist another Man's Freedom Fighter?" "Police Practice and Research: An International Journal, 3 (4), p. 287-304.

⁴³⁸ It should be noted, however, that Egypt, Jordan, Namibia and Syria have made statements stating that they "consider acts of national resistance in all their forms, including armed resistance to foreign occupation and aggression for the purpose of liberation and self-determination are not acts of terrorism".

⁴³⁹ STL, Appeals Chamber, "Preliminary ruling", cited above, p. 81-83, § 107-110.

⁴⁴⁰ STL, Appeals Chamber, "Preliminary ruling", cited above, p.83, § 110.

⁴⁴¹ STL, Appeals Chamber, "Preliminary ruling", cited above, p. 26, § 29.

⁴⁴² See Mahmoud Hmoud, 2006 . Negotiating the Draft Comprehensive Convention on International Terrorism. Major Bones of Contention ", JICJ , 4, p. 1039-1041.

Terrorist armed aggression therefore depends on a state decision. Judges of the ICJ concluded in the judgment of 27 June 1986 that the provision of material, financial and logistical support to groups engaged in acts of terrorism abroad, without the Aggressor State having direct control over such acts remains an unlawful act and not an armed attack. However, after 11 September 2001, any aid, funding, and support to terrorist groups would be qualified as terrorist offenses under international law, European provisions and national criminal law. Different offenses of organized crime, serious terrorist acts, systematic and organized, directed against the civilian population and committed by a state or an organization, could be qualified as crimes against humanity⁴⁴³. International terrorism is different from anything called organized crime. If acts of terrorism are planned, financed and perpetrated under the sponsorship of one State against another State, such acts may be characterized as acts of State armed aggression by the Security Council, which could in such cases to decide to react based on the Charter, including the principles of collective security, in order to protect international peace and security. In a state of war, terrorist offenses can be characterized as war crimes or crimes against humanity, as several internationalists have pointed out. In this case, the ICC may try suspected terrorists.

From what has just been presented, Antonio Cassese's customary definition of terrorism, both doctrinally and judicially, pursues the same aim: to fill the gaps in the law and thus to better apprehend the phenomenon of international terrorism. The whole of scholars and experts thoughts on the subject is, in fact, guided by the will to fight against impunity, which ultimately required a unique definition of the concept. This definition was later incorporated into the preliminary ruling by the Appeals Chamber of the STL, the only international court competent to deal with acts of terrorism. This transposition, which allows widening the means likely to be used for an act to be qualified as terrorist in Lebanon, is of limited practical interest in the Tribunal's jurisdiction. On the other hand, confirmed in jurisprudence, the customary definition of terrorism acquires a greater persuasive force likely to lead to an evolution of international law. Its ability to do so, however, remains uncertain if one considers the reception that the decision received. Nevertheless, the decision constituted a deliberate attempt of judicial law-making⁴⁴⁴, in continuation of what Antonio Cassese conceives as the role of the specialist of international law.

⁴⁴³ See Gilbert Guillaume, 1989. *The International Court of Justice at the early of the twentieth century: the analysis of a judge*, op. cit., p. 255-259.

⁴⁴⁴ Stefan Kirsch and Anna Oehmichen, 2011. "Judges Gone Astray: The Making of Terrorism as an International Crime by the Special Tribunal for Lebanon", *Durham Law Review Online*, p. 19.

In conclusion, the absence of a single classification of terrorist offenses reflects the weakness of the international system and the obvious legal gap in the international law. On the other hand, it has led to the strengthening of cooperation at both the international and regional levels, and has led States to develop their own national legal provisions and their domestic jurisdictions, which remain the only competent authorities in the field.

Chapter Five

The Concept of Foreign Terrorist Fighters at the Framework of International Law

5.0 Introduction

This chapter is about the foreign terrorist fighter issue concerning how the law seems to be changing in this field, what the implications might be for humanitarian action and then to highlight some of the recent developments in this field. Also give a bit of a context for the relationship between counterterrorism laws broadly, so this is where will be discussing in foreign terrorist fighters, and humanitarian action.

In the field of global counterterrorism, certainly we see in the wake of the September 11th 2001 attacks is a tremendous global effort to expand counterterrorism law. We also see the Security Council taking a leading role in requiring under Chapter 7 authority that every state implement laws and enforcement approaches that would ensure that global terrorists or transnational terrorists were not able to take advantage of loopholes in various territories to develop wealth, arms, and personnel. We also see a real move in the field of counterterrorism regulations to focus in not just on terrorist attacks themselves or bombs and military training themselves but also on the idea of support for terrorism.

After Security Council resolution 1373 which lays out many of the arenas in which the council is demanding that states implement criminal laws. The security council also moves into a much more robust approach to designating particular individuals and armed groups as terrorists, and thereby requiring that all states implement asset freezes and travel bans on those individuals and groups. So what we see is an effort to restrict and regulate support and that it falls to states to determine what does support for terrorism mean. Some states develop criminal laws that are exceptionally broad in their understanding of support and others tailor it very narrowly towards things that we might have traditionally seen as being support for terrorism. So our concern and where we came at this research is what happens when these two worlds meet when these two efforts at global lawmaking regulation and policy collide in areas where listed or designated terrorist actors controlled territory or access to a population in a situation that is an armed conflict where the civilian population and the wounded and sick require humanitarian assistance.

It should be noted that the Council decision further qualifies foreign fighters as 'terrorists', characterization is not without problematic consequences, especially with regard to the coordination of the measures contained therein with the rules of international humanitarian

law. It is necessary in this regard to discuss that the Res. 2178 must be inserted in the context outlined in particular by the Res. 2170 (2014) and 2199 (2015), which contain a series of measures aimed primarily at freezing up the funding sources of the Islamic State in Iraq and the Levant (ISIL), which took control of large territories in Syria and Iraq⁴⁴⁵.

5.1 Security Council Resolution 2178

On September 24, 2014, the United Nations Security Council, in a meeting chaired by US President Obama, approved the resolution 2178, by imposing on States the adoption of measures against foreign terrorist fighters. A series of legislation has recently been passed to give States the power to prevent what is called terrorism related travel. However, the definitions are vague and the rules are prone to being interpreted in a variety of ways. The constant reinvention of definitions means that we could be talking about the same piece of international law but at the national level there's more than one way of interpreting it. Therefore, many of international law scholar, academic and experts are involved in analyzing and understanding any new resolution that the UN Security Council passes like resolution 2178⁴⁴⁶. The resolution stated that all countries should make it a serious criminal offense for their citizens to travel abroad to fight with terrorist organizations or to recruit and fund others to do so⁴⁴⁷. At a meeting chaired by the US President Barack Obama, the 15-member council unanimously adopts 2178 drafted by the US and compelling countries to prevent and suppress the recruitment and travel of fighters to foreign conflicts⁴⁴⁸. The US President Barack Obama stated that *“the historic resolution that we just adopted, enshrines our commitment to meet this challenge. It is legally binding; it establishes new obligations the nations must meet. Specifically nations are required to prevent and suppress the recruiting organizing transporting or equipping of foreign terrorist fighters as well as the financing of their travel or activities”*⁴⁴⁹.

During the UN Security Council meeting, the US president Barack Obama was also stated that *“In the nearly 70 years, the United Nations there's only the sixth time that the Security Council is met at a level like this. We convene such sessions to address the most urgent threats to peace and security. What brings us together today, what is new is the*

⁴⁴⁵ Foreign terrorist fighters, Security Council Counter Terrorism Committee.

⁴⁴⁶ Ibid.

⁴⁴⁷ Anne Peters, 2014, Security Council Resolution 2178 (2014): The “Foreign Terrorist Fighter” as an International Legal Person, Part II.

⁴⁴⁸ Ibid.

⁴⁴⁹ President Obama Chairs U.N. Security Council Meeting, CNN Newsroom.

unprecedented flow of Fighters in recent years to and from conflict zones including Afghanistan, in the Horn of Africa, Yemen Libya and most recently Syria and Iraq. Our intelligence agencies estimate that more than 15,000 foreign fighters for more than 80 nations have travelled to Syria in recent years. Many have joined terrorist organizations such as al Qaeda's affiliate the Al- Nusrah Front and ISIL which now threatens people across Syria and Iraq. These terrorists exacerbate conflicts; they pose an immediate threat to people in these regions. And as we've already seen in several cases they may try to return to their home countries to carry out deadly attacks”⁴⁵⁰.

The resolution 2178 is a classic suppression resolution, so the drafters would probably argue that it doesn't create any sort of criminal legislation within the member states that it's aimed at. But it is just simply requires those member states or all member states , to suppress in their own legal systems their domestic legal systems some sort of legislative framework that would prevent fighters from joining up with the Islamic state⁴⁵¹. The Security Council resolution is under Chapter 7 of the UN Charter which means it's legally binding on member states and the Security Council has the authority to enforce Res. 2178 with economic sanctions or force. The resolution 2178 is directly addresses individuals as opposed to organizations or groups. So whereas before you might have prosecuted someone for being a member of Al-Qaeda for example, you can now arrest and jail them for travelling in order to become a member. In effect, Res. 2178 require member states to ensure that legal systems can prosecute as a serious criminal offense the travel for terrorism that includes helping someone else to travel or financing such activities.

It also compels member states to prevent suspects from entering or using their territories for transit for any terrorist related intentions and for this the states can ask Airlines to provide passenger lists. The UN resolution 2178 generally targets fighters travelling to conflicts anywhere in the world but it doesn't mandate military force to tackle the foreign fighter issue; what states can do is convict individuals or groups that are proved to be helping people joining the fight overseas. This is the sort of classic problem that happens with UN Security Council Resolutions or any other resolution in international law. For example, with the European Convention on Human Rights, so they allow for generally what's called a margin of

⁴⁵⁰ Ibid.

⁴⁵¹ Guidance to States on human rights-compliant responses to the threat posed by foreign fighters, Office of the United Nations High Commissioner for Human Rights (OHCHR), United Nations, New York, 2018 , P1-4.

appreciation, meaning it's a fancy way of saying that each member state has some discretion as to how to apply a piece of international law⁴⁵².

The other issue is the Security Council is made up of only 15 of the 193 countries represented at the UN, essentially which means the vast majority of nations have to adapt to regulations they haven't had a say in and while Security Council member states are setting the rules on things like human rights and civil liberties is anyone watching the remaining 178 member states to ensure they're not abusing that authority they're given under the excuse of preventing terrorism.

Through resolution 2178 the Security Council condemns violent extremism and the perpetration planning or participation of terrorism but it's failed to define what that means. It's not only lacking in clear definition but internationally it has no definition and pretty vague, it is a way of ideologically slandering someone whose views you disagree with and so it simply acts as a means of stigmatization.

To give an example Richard Baxter, who was a US military specialist at delegate to a number of conventions on international law said on terrorism; the term is imprecise, it is ambiguous and above all it serves no operative legal purpose⁴⁵³. Also Rosalyn Higgins who has a judge on the International Court of Justice from the UK said *"terrorism is a term without any legal significance; it is merely a convenient way of alluding to activities whether of states or of individuals widely disapproved of in which either the methods used are unlawful or the targets protected or both"*⁴⁵⁴. So what we are seeing is that from the legal side of things that people who are professionals and experts in this area indecisive at the very idea of having some sort of legal significance attached to terrorism. The big problem in the UK and other countries are terrorism law, which is that terrorism can apply to practically anything, it is extremely broad and general and vague. You also find with a lot of UN documents particularly Security Council documents they don't necessarily give definitions to those terms and it is problematic, as for example , to what a foreign fighter is and what is an illegitimate armed force. For instance, if you take genocide there is a legal definition of genocide in the Genocide Convention⁴⁵⁵ and that's what you find in the statute of the International Criminal

⁴⁵² Ibid.

⁴⁵³ Baxter, Richard , 2015. "A Sceptical look at the Concept of Terrorism," Akron Law Review:, p380-387.

⁴⁵⁴ Higgins, Rosalyn and Maurice Flory, 1997. The general international law of terrorism: Routledge, London. P 13-30.

⁴⁵⁵ Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948.

Court and as a legal definition of torture in the UN Convention against Torture⁴⁵⁶, however, so far there's no generally accepted definition of terrorism. In the past, there are cases where states have defined terrorism based on who their enemies are, also tells us that those definitions are prone to change depending on what the government defines as the national interest. While thousands travelling to fight alongside ISIS but there are a few who have gone to fight on the other side by joining for example YPG⁴⁵⁷ or the Kurdish people's protection units. Some fighters changed their mind after growing suspicious of the group's ties to the Kurdistan Workers Party⁴⁵⁸ (PKK) which has been designated a terrorist organization by USA and Europe. This is because they are worried that they would never be allowed to return to their countries if they were seen to be associating with the PKK.

PKK is still on the terrorist list even there's a big campaign to have it taken off the terrorist list but it's still there at the present moment. So associating with the PKK in any way whatsoever is dangerous any case. For example, Macer Gifford is a former public school boy who proudly poses with weapons on his face book page as he fights against ISIS⁴⁵⁹. Macer is fighting with the Kurdish people's protection units in Iraq and Syria. In this case Macer possibly being in breach of resolution 2178. In this regards the Home Office spokesman commented that *"the UK has consistently advised against all travel to Syria and parts of Iraq⁴⁶⁰, anyone who travels to these areas is putting themselves in considerable danger. It's added the following guidance anyone who engages in fighting abroad could potentially be prosecuted under the UK's criminal or terrorism laws. Whether an individual is arrested or prosecuted will always depend on the facts and circumstances of the case, and is an operational decision for the police and the Crown Prosecution Service"*⁴⁶¹.

This is depending on the ideological circumstances and depending on who is the group or party. So as mentioned in this case, it's the PKK which despite the fact that it's a prescribed

⁴⁵⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ,New York, 10 December 1984.

⁴⁵⁷ YPG (People's Protection Units) is the official army of the Kurdish area of Syria (Rojava or Western Kurdistan), and organized after the attacks of the Syrian Baathist regime in 2004 in small groups to protect the people. Having organized itself in all the cities of Rojava and having experience, it was formally established in 2011, and the YPG operates in the districts of Afrin, Al-Jazeera, Kobani and Sheikh Maqsood in Aleppo.

⁴⁵⁸ Kurdistan Workers' Party or in Kurdish language (Partiya Karkeren Kurdistan –PKK), which was founded secretly on November 27, 1978, by Kurdish students, including Abdullah Ocalan, who was chosen as the party's first president. They adopted Marxist-Leninist thought and began to demand an independent Kurdish state in the predominantly Kurdish areas in Turkey, Iraq, Syria and Iran. PKK has been engaged in an armed conflict with Turkey since the 1980s and 1990s, and still continues fighting to its demands for more Kurdish rights including some sort of autonomy in south-eastern of Turkey.

⁴⁵⁹ Lizzie Dearden, 2017, British volunteer fighting against Isis in Raqqa says it is a 'matter of time' before Islamic State falls, Independent News Home Affairs Correspondent.

⁴⁶⁰ BBC News, 2015, Briton fighting with Kurds against Islamic State defends actions.

⁴⁶¹ Ibid.

terrorist organization, it's a situation of the enemy of my enemy is my friend, and so everybody to a certain extent suspends the application of the law where it's politically expedient. And of course the PKK isn't the only circumstance. There is a notable circumstance where this happens too when a fighter is joining up with the Israeli Defence Forces. There is legislation particularly United Kingdom that prohibits individuals from joining a foreign fighting force in any event whether it's a designated group or not⁴⁶².

For example you can't go and join a foreign nation and join their army and start fighting in conflict there's. There's an old piece of legislation from the 1800s that still prescribes that and that's one of the issues that was raised in UK Parliament solely by George Galloway in relation to the Israel-Palestinian conflict in that British citizens are joining the IDF and could in effect face prosecution when they return to UK irrespective of whether there is a determination on the status of the IDF, Israel as a legal category, it doesn't matter that it's a legitimate armed force because it's still fighting for a foreign country⁴⁶³.

The phenomenon of joining conflicts abroad isn't new, some countries recruit foreigners to their armed forces. For example Bangladesh and Pakistan recruit Palestinians who come to train in their military academies, non Israeli Jews are allowed to join the Israeli army through a series of programs and any citizen of a European Union country is eligible to join the Belgian Armed Forces and of course troops from all over the world take part in military operations as part of the UN peacekeeping force.

The French Foreign Legion was set up in 1831 as a military service wing of the French army. Although it was exclusively created for foreign nationals who wanted to join the French army nearly a quarter of its recruits are French citizens⁴⁶⁴. The Spanish government also set up the International Brigade during the 1930s Civil War. Foreign fighters joined the units mainly through communist parties around the world travelling to Spain had to be done using clandestine routes much like the way fighters arrived in Syria today. Although governments including the British and French didn't recognize the right to join the brigades, there were no convictions if any of them returned to those countries⁴⁶⁵.

More recently the mountainous terrains of northern Afghanistan saw soldiers who arrived in the thousands to fight against Soviet forces. Some trained and equipped by Western nations,

⁴⁶² Foreign Enlistment Act 1870.

⁴⁶³ George Galloway speaking in Parliament about Israel and Palestine debate - 1st December 2014

⁴⁶⁴ Douglas Porch, 1991, , The French Foreign Legion. A Complete History of the Legendary Fighting Force, French Foreign Legion Military Organisation.

⁴⁶⁵ David Malet, 2018, The European experience with foreign fighters and returnees, Returnees; who are they, why are they (not) coming back and how should we deal with them . Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands. P6-10.

the foreign fighters came from all over the world and included men who would go on to become some of the main players in other conflicts like Osama bin Laden. Bin Laden is credited with financing and directing a contingent of all Arab fighters with the assistance and support of the Saudi and Pakistani government's. Their efforts contributed to the 1989 withdrawal of Soviet forces from Afghanistan. While some of Afghanistan's Mujahedeen⁴⁶⁶ returned home, many went on to fight on the side of the Bosnian during the 1990s Bosnian war. They joined a number of other foreign fighters who had started off as humanitarian workers. The Bosnian Mujahedeen's primary aim was to fight for Islam and many of them are still considered heroes in their respective home muslim communities.

A decade later the same territories of Afghanistan were to become a source of foreign fighting activity but this time not with the same approval from the fighters' home countries. The UK army officers conducting the USA led war against the Taliban complained of a surreal mini British civil war with a growing number of home-grown fighters.

At the time MI5 estimated that up to 4,000 British citizens had travelled to Pakistan and Afghanistan for military training. The parameters have shifted, the idea of foreign fighters once considered heroes both at home and by their host countries has become problematic even for the states that used to approve them. While we still have the French Foreign Legion and UN peacekeepers, the face of a foreign soldier these days is masked in black and associated more with beheadings and burning prisoners alive than with the selfless support and struggle of a Mujahedeen fighter, and while the International Law seeks to universalize what is and isn't allowed nation states are nowhere closer to agreeing on definitions.

However, it has given countries the International approval they need to pass laws under the banner of anti-terrorism so that for the first time in its history France seized the passports of six of its citizens who it claimed were planning to travel to fight in Syria. The government estimates that about fourteen hundred French citizens have links to recruitment cells for Syria and Iraq of which 400 are believed to already be fighting there. The ability to seize passports and identity cards of anyone suspected of travelling to fight is one of the key measures of the French anti-terrorism bill that was passed by Parliament two months after resolution 2178. The consequence of that UN Security Council meeting raises questions about a measure perhaps too extreme and this resolution 2178 can be abused. This has been the case with previous UN Security Council resolutions targeting specifically terrorism. For example, probably the best document in a tested example was in relation to UN Security Council

⁴⁶⁶Mujahedeen means guerrilla fighters in Islamic countries, especially those who are fighting against non-Muslim forces.

resolution 1267 that created what's called a blacklisting regime. By virtue of resolution 1267 there was a Security Council committee convened and they would place individuals and organizations on a blacklist. The problem was in many well documented instances individuals were caught on a blacklist because they had an identical name to someone who was suspected of terrorism or there was a mere suspicion that they were up to something. These individuals had no means of getting off the blacklist even in circumstances where the judiciary or the courts of member states agreed and said their names didn't belong on the list. The problem is the Security Council is not a judicial body so you do not have for example any means of redress if there's an error and you have no way of appealing decisions. In fact from the time that UN Security Council resolution 1267 was implemented until today, there were a hundred cases of what could be call abuse or miss application and 1267 therefore relies on members of the Security Council of reviewing these cases. Because there's a veto power on the Security Council, it subjects to a certain type of politicization where the review process can be vetoed so it's effectively hijacked by for example China or Russia owning two political considerations not legal considerations. If we look at any resolution it is not without its problems, however, this resolution is probably a lot clearer than many resolutions that come out the Security Council. It will take time the situation with Islamic State which is certainly developing every day and expanding throughout the region and it's becoming a bigger problem this will suggest further resolutions come out of the Security Council. International Law was never going to be easy to master the reality when dealing with global organizations that seek to establish parameters for legislation that's at a national level. This means without proper clarification and without set definition of terms like terrorism, member states can continues using and even misusing resolution 2178 in ways it may be so complicated to explain⁴⁶⁷.

5.2 The Definition of Foreign Terrorist Fighters

The case of foreign terrorist fighters is a very important development related to radicalization leading to violence. These concerns are reflected, in particular, in the actions that try to prevent these individuals from going to fight abroad and through the management of the return of these combatants. This raises the question of what exactly is a foreign fighter. Foreign fighter is a relatively new concept and you don't find it in the academic literature before the early 2000s. There is still some conceptual work to be done in this field but work

⁴⁶⁷ Ibid.

by Thomas Hegghammer⁴⁶⁸ and a scholar David Malet⁴⁶⁹, has tried to narrow down a definition of foreign fighters. The first thing about foreign fighters is to as an intermediary category between two types that are very familiar from the international relations literature; we have insurgents on the one hand and international terrorists on the other hand. Insurgents in a nutshell operate locally and they use guerrilla tactics. International terrorists on the other hand, operate transnationally and use terrorist tactics. Foreign fighters take one element of each, so they operate transnationally but they use primarily guerrilla tactics. They move like international terrorists but they fight like insurgents. However, this can be narrow it down further with four key criteria;⁴⁷⁰

First, foreign fighters are typically private actors and that sets them apart from deployed soldiers. Second, they are also typically unpaid or receive a very low pay which sets them apart from mercenaries who go out and fight for money. Third, they are not from the conflict area that they are fighting in and it sets them apart from traditional insurgents who typically have sort of born and rose in the place they fight. Fourth, they fight like insurgents, they typically engage primarily in guerrilla type activity and in that respect they differ from international terrorists.

Despite these concerning prospects and the fact that foreign fighters are increasingly the subject of public and security service concern, few studies go beyond individual case studies and utilize the possibilities of comparative historical approach. One significant exception is David Malet's comparative study of foreign fighters' transnational identity in civil conflict, Malet defines foreign fighters as *"non-citizens of conflict states who join insurgencies during civil conflict, and furthermore as individuals who are not driven by promise of material reward, but by ideological- religious motivations and the perception of transnational threat against their own community"*⁴⁷¹.

Yet another possibility is Moore and Tumelty definition of foreign fighters as *"non-indigenous, non-territorialised combatants who motivated by religion, kinship, and/ or ideology rather than pecuniary reward, entre a conflict to participate in hostilities"*⁴⁷². It can nevertheless be argued that these definitions are too narrow, and that a more diverse approach

⁴⁶⁸ Thomas Hegghammer , 2011, "The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad", in *International Security*, Vol. 35, No. 3, p. 53-94.

⁴⁶⁹ David Malet , 2015 , *Foreign Fighter Mobilization and Persistence in a Global Context*, *Terrorism and Political Violence* 27 , Issue 3, p454-473.

⁴⁷⁰ David. Malet, 2017, *Foreign Fighters: Transnational Identity in Civil Conflicts*, 2nd edition. New York: Oxford University press.

⁴⁷¹ David. Malet, 2010. "Why Foreign Fighters?: Historical Perspectives and Solutions," *Orbis*, pp. 97-114.

⁴⁷² Cerwyn Moore & Paul Tumelty , 2008. *Foreign Fighters and the Case of Chechnya: A Critical Assessment*, *Studies in Conflict & Terrorism*, 31:5, 412-433.

is needed. One such multi-pronged definition would be to divide foreign fighters into four different categories, which Maja Touzari Greenwood has attempted;⁴⁷³

- Local foreign fighters, who engage in regionally limited conflicts, such as the civil wars in Libya and Syria.
- Terrorist fighters, who fight as part of global terrorist networks such as Al-Qaeda and the ISIS.
- Migrant fighters, who migrate to the areas where they fight.
- Diaspora fighters, who have ethnic or family/clan attachments to the area where they fight (such as al-Shabaab or the Kurdish insurgents in Northern Iraq, Iran, Syria or Turkey).

As many concepts in social science, the concept of Foreign Fighters are not always crystal clear. There are some borderline phenomena that can be difficult to classify as foreign fighter or not. For instance, first we have the case of Diaspora volunteers for example Somali British who going and fight in Somalia. They may be raised in the United Kingdom but they have a family connection to the conflict that is joining. So the one criterion about not being from the conflict area is blurred⁴⁷⁴. Another borderline phenomenon is Ideological Volunteers to Foreign Militaries, for example every year many non-Jewish Europeans traveled to Israel to serve in the Israel Defense Forces (IDF) usually for ideological reasons. Now this is also borderline case because the IDF is not an insurgent organization but at the same time there is ideology motivating the volunteers. A third borderline phenomenon is Terrorist trainees, for example European Islamists who travel to Pakistan to train with Al-Qaeda central and some of them may leave with the intention to fight in Afghanistan as insurgents but they end up basically training for international terrorism. This poses a definitional question should we see them as foreign fighters or as international terrorists. The fourth borderline phenomenon Volunteers in non-combat roles, in many foreign fighter destinations you see if foreign volunteers arriving and doing things other than fighting. They may serve as aid workers or help with logistics and so on, that poses a question whether we should count them as foreign fighters or not.

In this context, the Security Council resolution 2178 (2014) defined the phenomenon of foreign terrorist fighters as “an individual’s who travel to a State other than their State of residence or nationality for the purpose of committing, organizing or preparing acts of

⁴⁷³ Greenwood, M., 2017. Islamic State and al-Qaeda's Foreign Fighters. *Connections*, 16(1), 87-98.

⁴⁷⁴ Alex P. Schmid, 2015. Foreign Terrorist Fighter Estimates: Conceptual and Data Issues, ICCT Policy Brief, P3-7.

terrorism, or for participating in or giving or receiving training in terrorism, particularly in the context of an armed conflict "⁴⁷⁵.

According to the above definition, three conditions are required to be met in order to be label an individual as foreign terrorist fighters. The person must travel to a country other than that of his nationality or residence; the person have the intention of participating by any means whatsoever in terrorist acts or; to receive / provide training in terrorism. This definition creates a complexity by referring to the question of the country of residence. According to the above definition, for the person to be considered a foreign terrorist fighter, the state to which he or she surrenders must not be his country of nationality or country of residence. But if his country of residence turns out to be the country where the conflict is taking place, the person can participate without meeting the definition of foreign terrorist fighter. In other words, to justify one's residence in the country of the conflict is enough to avoid being classified as a foreign terrorist fighter. This residence has no time limit or period. Thus a person, who travels to a country on a regular basis, asks for a residence permit and gets it; may participate in terrorist acts or receive / provide training in terrorism without being counted among foreign terrorist fighters.

This opens the way for several foreign terrorist fighters to escape their status by the fact that, in the case of both current and future conflicts, some of them can claim the status of resident that their purpose, even before obtaining the resident's card, was terrorist action. However, there is the question of people who have been in the country for long periods before the conflict and whose first reason for settling in this country was other than terrorist. This category can logically be assimilated to nationals and escape the status of foreign terrorist fighter. The question of the State of residence must be accompanied by conditions concerning the period of stay and the period of stay as well as details of the relationship between the beginning of the stay and the date of the outbreak of the conflict.

Thomas Hegghammer , the Norwegian expert, provides a more elaborate in his study on the Rise of Foreign Fighters, compiled by the Belfer Centre for Science and International Affairs of Harvard University⁴⁷⁶; he identifies four criteria for distinguishing a foreign fighter. "The foreign terrorist fighter is for him an individual:

- who joined an insurrection and operates within it;

⁴⁷⁵ Ibid.

⁴⁷⁶ Thomas Hegghammer, 2011. "The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad, International Security, Vol. 35, No. 3, pp. 53–94.

- who does not have citizenship or kinship with the conflicting parties;
- who is not affiliated with an official military organization and;
- who is not paid.

The notion of "foreign terrorist fighter" is therefore two-headed:

- A "foreign fighter" is someone who has left their country of origin and has joined a non-state armed group in an armed conflict abroad by ideology, belief or affinity.

- He/she is a terrorist; this attribute refers to two explanations:

- either a person who joins countries on whose territories terrorist organizations are established and have training camps where he can receive training that will allow him to carry out attacks upon his return to his country of origin .
- either it is a fighter who commits terrorist acts on the territory where the armed conflict is taking place, knowing that this territory is not that of his country of origin.

Thomas Hegghammer does not even bother about the resident's question; he evokes a question of kinship with the conflicting parties, opening another question: what is kinship with a territory? Is it a relationship with a citizen of that territory or an administrative relationship with the territory itself? The complexity of the concept does not allow dealing in this chapter. It would be sufficient to say that the question of the common definition affects cooperation between States. We cannot fight a phenomenon together if we do not apprehend it in the same way. Terrorism is a cross-border phenomenon with its motivations and implications. The globalization of radical Islamic organizations, the broadening of their sources of funding, and the exploitation of social networks to promote their Salafi jihadist ideology and attract foreign terrorist fighters make the standards defined by Hegghammer insufficient to define a foreign terrorist fighter.

The National Centre for Counter-Terrorism in The Hague⁴⁷⁷ counts on the lack of a common definition among the challenges encountered even in the country census of these foreign fighters; "each country introduces those which it judges, from its own point of view to be part of this category. Several challenges were encountered during the collection period, especially with regards to the number of FTF. First, lacking a common and agreed definition of FTF ..." This is how the report of the above-mentioned centre makes a special recommendation for the

⁴⁷⁷ Berenice Boutin ; Gregory Chauzal ; Jessica Dorsey ; Marjolein Jegerings ; Christophe Paulussen ; Johanna Pohl ; Alastair Reed ; Sofia Zavagli, (2016). The Foreign Fighters Phenomenon in the European Union; Profiles, Threats & Policies; ICCT Research Paper.

question of definition. “One common definition of FTF is necessary to ensure coherence in policies, accuracy in data collection and greater validity when it comes to data analysis”⁴⁷⁸.

Although there is no generally agreed definition of what could consider a terrorist, we can only resort to legal analysis to determine from an international treaty or some Security Council resolutions or domestic laws what exactly mean when we say a terrorist or a foreign terrorist fighter. When we look at the definition from Res. 2178 of what a foreign terrorist fighter is, and the Security Council promulgated the following “it’s *a national who travels or attempts to travel to a state other than their state of residence or nationality and other individuals who travel or attempt to travel from their territories other than their states of residence or nationality*”⁴⁷⁹. There are no clear answers to these questions and different commentators, analysts and scholars will classify individual groups of activists differently depending on how the stance they take on these borderline cases.

5.3 The need to improve counter-terrorism measures

On September 24, 2014, the United Nations Security Council in a meeting chaired by US President Obama approved the resolution 2178 by imposing on States the adoption of measures against foreign terrorist fighters. The global approach of the decision adopted on the basis of Chapter VII of the UN Charter, which is based on three pillars: the fight against radicalization and violent extremism through initiatives that involve the civil society of the member states; prevention measures in the strict sense especially with regard to controls on the movement of suspected terrorists; the judicial response in the sense of the advance of the criminal protection raise crimes of acts which precede the commission of a terrorist act. Because of the categorization of terrorism as a threat to peace and the general nature of the obligations envisaged, the Res. 2178 (2014) was immediately combined with the previous resolutions 1373 (2001) and 1540 (2004). These decisions are highly criticized by the doctrine because with them the Security Council would have acted *ultra vires* exercising legislative powers not provided for by the UN Charter⁴⁸⁰. First of all, it was claimed that situations such as international terrorism and the proliferation of weapons of mass destruction

⁴⁷⁸ Ibid.

⁴⁷⁹ United Nations Security Council Resolution 2178 (2014).

⁴⁸⁰ R. Cadin, 2008. The assumptions of the action of the Security Council in art. 39 of the United Nations Charter, Milan, pp. 305-312; Also P. Gargiulo, 2009. Non-proliferation of weapons of mass destruction and fight against terrorism, The crisis of disarmament in international law, on the fourth centenary of the death of Alberico Gentili, XIII Convention SIDI, Naples ,p. 235

as such could not be traced back to the notion of threat to peace on the basis of art. 39 of the UN Charter⁴⁸¹, and therefore constitute the assumption of the action based on Chapter VII.

However, they considered that this determination remained in reality within the margin of discretion assigned by the Charter to the Security Council and that the art. 41 of the UN Charter could indeed constitute an adequate legal basis⁴⁸². While noted the formation of a consensus around the fact that the Council itself could issue urgent measures of a binding nature and general character in order to counter the serious threat to peace and to the security represented by the terrorist activities of non-state actors on a global scale⁴⁸³. But this assumption was based on the fact that res.1373 and res. 1540 essentially reproduced obligations previously entered into multilateral treaties which States were invited to ratify such as the Convention against the financing of terrorism. More problematic is the application of this argumentative pattern to res. 2178, since at the time of its adoption there was no contractual text concerning foreign fighters.

The Security Council in adopting the res. 2178 has in fact acted as a material body of the international community, thus exercising new powers not provided for by the Statute in order to provide an additional level of legitimacy or implementation to measures that the States had already decided to manage general interests. This approach is based on the fact that the fight against terrorism is now a general interest of the international community and on the thesis, shared by us, of the existence in general international law of rules on the prevention and repression of terrorist activities, especially productive norms of obligations *ergo omnes*⁴⁸⁴. Moreover, the draft resolution had received support from more than one country which had therefore expressed the urgent need to contrast according to a global approach the complexities and transformations underway in Islamist extremism. Although there is an explicit reference to the need to implement the measures contained therein with respect to the

⁴⁸¹ Chapter VII — Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article -39 “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

⁴⁸² Chapter VII — Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article -41 “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

⁴⁸³ M. Sossai, 2012. The prevention of terrorism in international law, Turin, pp. 49-53.

⁴⁸⁴ J. Proulx, 2012. Transnational Terrorism and State Accountability: A New Theory of Prevention, Oxford – Portland. For a discussion of the issue of legitimacy according to the different approach of transnational law, see also C. Murphy, 2015. Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the 'Wars on Terror', King's College London Law School Research Paper No. 2015-14.

foreign fighters operating in support of ISIL and the Al-Nusrah Front, the res. 2178 lacks a definition of terrorism. This could have referred to paragraph 3 of the res. 1566 (2004)⁴⁸⁵ which contains one on which a broad consensus was reached among the States⁴⁸⁶. Also expressed in the framework of negotiations towards a global convention and which had also been recalled by international jurisprudence⁴⁸⁷. There are three cumulative conditions on the definition is based on: (1) it must be acts carried out with the intent to cause the death of a person or to cause serious injuries or the capture of hostages; (2) in order to provoke a state of terror and intimidate the population or force a government or international organization to perform or refrain from doing any act; (3) which constitute offenses according to international treaties on terrorism. Previously in the days of approval of the res. 2178, an authoritative voice had highlighted in the absence of a definition of terrorism the risk of possible abuses deriving from the indeterminacy of the criminal offenses envisaged by the resolution to the point of believing that "Res. 2178 (2014) eliminate the gradually progress made over many years in introducing protections of human rights and the rule of law into the highly problematic manner in which the Security Council exercises its supranational powers"⁴⁸⁸.

5.4 The legal status of foreign fighters in International Humanitarian Law

The resolution 2178 introduces the notion of 'foreign terrorist fighter', defining it as follows: *"individuals who travel to a state other than of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the provision of terrorist training, including in connection with armed conflict"*⁴⁸⁹. The three essential elements of the definition are the 'foreign' character of the combatants; their qualification as terrorists; their participation in an armed conflict. As for the first character, the notion would

⁴⁸⁵ paragraph 3 of the res. 1566 (2004) "Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature".

⁴⁸⁶ K. Ambos, 2014. Our terrorists, your terrorists? The United Nations Security Council urges states to combat "foreign terrorist fighters", but does not define "terrorism", in EJIL: Talk!.

⁴⁸⁷ Special Tribunal for Lebanon, Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging, STL-11-01/I/AC/R176bis, 16 February 2011.

⁴⁸⁸ M. Scheinin, 2014. Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters, in Just Security.

⁴⁸⁹ UNODC, 2018. Investigation, Prosecution and Adjudication of Foreign Terrorist Fighter Cases for South and South-East Asia, United Nation Office on Drugs and Crime , Vienna.

seem at first glance to exclude the situation in which an individual leaves his country of residence to return to his country of origin: for example, the case of a Syrian resident in a European state headed for Syria. However, in light of the aim and purpose of the resolution the correct interpretation of the conjunction or between residence and nationality seems to be the most extensive to understand even the situations just outlined⁴⁹⁰.

The reference to the terrorist character of foreign fighters associated with their participation in an armed conflict is more problematic. To understand the possible problematic outcomes of such a definition of a foreign terrorist fighter, it is necessary to start from the issue of the possible existence of an armed conflict and the question of the legal qualification of the presence of foreign fighters according to international humanitarian law.

First of all, although the view sustained by the United States continues to be that of the continuing existence of an armed conflict of a non-international character with Al-Qaida⁴⁹¹, has been stressed by several parties that the 'War on terror' must in fact distinguish itself according to its components. It will have to be verified that the identified threshold has been exceeded for international armed conflicts by the common article 2 of Geneva Conventions in the existence of a conflict between states, and for internal conflicts, in the existence of clashes of a certain intensity between the armed forces of a state and the insurgents or between groups organized within a State⁴⁹².

As a preliminary point, it should be noted that foreign fighters do not fall into the category of mercenaries under the law of international armed conflicts. This is because they do not fulfil the condition of being motivated by profit-making purposes⁴⁹³. In this context the issue of possible connections between Al-Qaeda and ISIL there is no doubt about the characterization of violent scenarios in Syria and Iraq as armed conflicts of a non-international nature. Rather, the Syrian case highlights the existence of a complex situation in which it is not always easy

⁴⁹⁰ Ibid.

⁴⁹¹ H. Koh, 2010. The Obama Administration and International Law, speech at the annual meeting of the American Society of International Law.

⁴⁹² The art. 3 does not contain a definition of non-international armed conflict: in the Tadic case, it was established that there is an armed conflict when armed violence takes place between government authorities and organized armed groups or between armed groups organized within the state. ICTY, The Prosecutor v. Dusko Tadic, IT-94-1-T, sentence of May 7, 1997, par. 561-568; The Prosecutor v. Fatmir Limaj, IT-03-66-T, sentence of 30 November 2005, par. 94-170. It should be noted that the II Additional Protocol provides for a more restrictive definition of non-international armed conflict: first of all, it introduces the condition of control of the armed group on part of the territory; secondly, it excludes from its application the armed conflicts between non-state armed groups. See also ICRC, 2008. How is the Term "Armed Conflict" Defined in International Humanitarian Law ?, Opinion Paper.

⁴⁹³ S. Percy, 2007. Mercenaries: The History of a Norm in International Relations, Oxford.

to identify the different parts of the conflict. Also because of the difficulty in verifying if the different rebel factions satisfy the conditions for their qualification as an organized armed group. Since 2013, the Syrian armed forces have been involved in a non-international armed conflict against, at least, the Free Syrian Army (FSA), Al-Nusrah Front and, starting from April of that year the ISIL. Contributing to the fragmentation of the scenario would be added conflicts that see opposites of different armed groups. The Kurdish People's Protection Units (YPG) that oppose ISIS also constitute an armed group⁴⁹⁴.

As for the status of foreign fighters in Syria⁴⁹⁵, they become part of the organized ISIL group, which constitutes a non-state party to the non-international armed conflict subject to the common article 3 of Geneva Conventions and to the customary international law on the subject⁴⁹⁶. However, the identification of members of the armed group is significant from the point of view of the protection of the civilian population that cannot be attacked while it represents a point firm the principle that insurgents are not legitimate fighters and can be punished including foreign fighters for the mere fact of taking part in the conflict⁴⁹⁷. It remains that the legal characterisation internally or internationally, or politics of a group armed as a terrorist is irrelevant to the existence of an armed conflict governed by international humanitarian law⁴⁹⁸.

It must be underlined in any case that international humanitarian law expressly prohibits acts of terror. As for the regulation of non-international armed conflicts, the common article 3 of Geneva Conventions already contains an implicit ban on carrying out terrorist attacks. With regard to people who do not take an active part in the conflict, the provision prohibits in any situation violence against life and the person and the taking of hostages elements that characterize most acts of terrorism. In addition, article. 4 (2) (d) of the II Additional Protocol prohibits acts of terrorism against all persons who do not participate directly in hostilities or do not participate in them anymore. Also the subsequent art. 13 (2) of the II specific protocol that violent acts carried out with the primary purpose of spreading terror among the civilian population are prohibited⁴⁹⁹. Finally, according to the principle of distinction, humanitarian law prohibits a series of other acts which if carried out outside of an armed conflict, would be

⁴⁹⁴ S. Casey-Maslen, 2014. *The War Report: Armed Conflict in 2013*, Oxford, p. 207.

⁴⁹⁵ S. Kraehenmann, 2014. *Foreign Fighters under International Law*, Academy briefing No. 7. p18.

⁴⁹⁶ UN Doc. A / HRC / 27 / CRP.3, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic. *Rule of Terror: Living under ISIS in Syria*, 19 November 2014, par. 76.

⁴⁹⁷ N. Ronzitti, 2014. *International Law of Armed Conflicts*, 4th ed, Turin, p. 363.

⁴⁹⁸ S. Kraehenmann, 2014. *Foreign Fighters under International Law*, cit., P. 23.

⁴⁹⁹ Ibid.

commonly classified as being of a terrorist nature⁵⁰⁰. For example refers to indiscriminate or disproportionate attacks or attacks on certain categories of goods such as monuments or places of worship or objects indispensable to the civilian population, or installations containing dangerous forces. Alternatively, the International Committee of the Red Cross (ICRC) expressed concern over the overlapping and possible combination between international humanitarian law and the international legal framework on terrorism especially with regard to the qualification as a terrorist acts that are lawful or otherwise not prohibited by the law of armed conflicts, such as attacks on personnel and military installations⁵⁰¹.

It should be noted that the International Independent Commission of Inquiry on Syria found that as of April 2013, ISIL, as an armed group part of the conflict violated its obligations to civilians and *hors de combat* (people outside the fight) serious violations that constitute war crimes. The Commission has concluded that “*attacks on the civilian population have come to light through the coordinated campaign of spreading terror among the civilian population. The terror inflicted on the civilian population is clearly evidenced by witness and victim accounts*”⁵⁰². The report then specified that “*such terror was inflicted through a systematic imposition of restrictions on fundamental rights and freedoms and through the large-scale commission of violations of humanitarian law and war crimes including sentencing and executions without trials, killing, and mutilation, rape, sexual violence, forced pregnancy, torture, cruel treatment, the use and recruitment of children, and outrages upon personal dignity*”⁵⁰³.

5.5 The concept of Foreign Terrorist Fighters and International Law

It will be appropriate here to discuss from a legal point of view and international law in particular, the concept of FTF in order to clarify this relatively new concept.

The motivations of the foreign fighter are not so much financial and material, but rather ideological and religious. In other words, a foreign fighter is an individual who leaves his

⁵⁰⁰ J. Pejic, A. Salinas DeFrias, K. Samuel, N. White, 2012. Armed Conflict and Terrorism: There is a (Big) Difference, Counter-Terrorism: International Law and Practice, Oxford, p. 171 ss.; B. Saul, 2014. Terrorism and International Humanitarian Law, Research Handbook on International Law and Terrorism, Cheltenham, p. 208.

⁵⁰¹ ICRC, 2011. International Humanitarian Law and the Challenges of Contemporary Armed Forces, p. 48.

⁵⁰² International Independent Commission of Inquiry on Syria, UN Doc. A / HRC / 27 / CRP.3, Rule of Terror: Living under ISIS in Syria, cit., Par. 77

⁵⁰³ Ibid.

country of origin or residence to join a non-state armed group in a third country in conflict whose main motivation is ideological rather than material⁵⁰⁴.

As a result of the significant phenomenon of FTF joining ISIS in Syria and Iraq and therefore potential returns to countries of origin or residence, the UN Security Council adopted two resolutions in 2014 (2170 and 2178) for states to take action against foreign terrorist fighters. These resolutions explicitly refer to the term Foreign Terrorist Fighters associating the activities of the foreign combatant in an armed conflict with activities related to terrorist networks. However, according to Kraehenmann⁵⁰⁵ such an association is problematic and reductive from the point of view of international law⁵⁰⁶ since different branches of the latter regulate the question of armed conflicts (International Humanitarian Law-IHL) or the law of armed and the issue of the prevention and suppression of terrorism (a legal framework developed within the United Nations, such as Security Council resolutions or regional legal corpus on counter-terrorism, following the example of the Council's decisions of the European Union or Council of Europe Conventions). For example, resolution 2178, which will be discussed further below, blurs the boundaries between the notion of terrorism and armed conflict by creating legal consequences for FTFs intending to travel to a conflict zone⁵⁰⁷.

In International Humanitarian Law, its protection for people affected by armed conflict and the legal consequences of acts of individuals in armed conflict are closely related to the status of the person. Thus, the question of the status of foreign combatants in armed conflict is legally important in determining the role and responsibility of a FTF. IHL distinguishes between International Armed Conflicts (IAC) and Non-International Armed Conflicts (NIAC) ⁵⁰⁸ and codifies two distinct legal regimes respectively. According to Kraehenmann, most foreign fighters are engaged in Non-International Armed Conflicts which is civil wars.

⁵⁰⁴ Thomas Hegghammer, 2011. the Rise of Muslim Foreign Fighters. Islam and the Globalization of Jihad, "International Security, vol. 35, No. 3, pp. 57-58

⁵⁰⁵ Kraehenmann.Sandra, 2016. The Obligations under International Law of the Foreign Fighter's State of Nationality or Habitual Residence, State of Transit and State of Destination. Foreign Fighters under International Law and Beyond. p 229-258.

⁵⁰⁶ Moreover, as seen above, the concept of Foreign Fighter has not always been associated with jihadist terrorism and has not always been a phenomenon related to Islam (radical), like foreign fighters who engaged in the Spanish Civil War. However, from the Soviet invasion of Afghanistan, religious affiliation is a key link between foreign fighters taking part in conflicts in the Muslim world, including Afghanistan, Iraq, Mali, Nigeria, Somalia, Syria or Yemen .The attacks of 11 September 2001 in the United States will further accentuate the association between FTF and radical Islam with regard to foreign fighters joining the ranks of the Taliban and al-Qaida. It is in this context that the notion of Foreign Fighter is largely associated with Islam, Islamism and jihadism.

⁵⁰⁷ Ibid.

⁵⁰⁸ Kraehenmann. Sandra, 2014. Foreign Fighters Under International Law, p. 15-20

Indeed, almost all current conflicts result in civil wars, however, with international components like the forces of international coalitions involved in an internal conflict. Regarding the status of Foreign Fighters during a Non-International Armed Conflicts⁵⁰⁹, IHL does not refer to the status of combatant or prisoner of war and does not clearly define the conditions of detention during a war. During a NIAC, IHL applies to anyone involved in an armed conflict regardless of the foreign fighter's nationality. And the absence of a combatant status means that any individual including the foreign fighter can be sued by his or her country of origin or residence for taking up arms during a NIAC, regardless of whether such acts have been conducted in violation of IHL or not. This implies that fighters of an armed opposition during a NIAC would tend not necessarily to observe the IHL since; in any case, they can be prosecuted and punished according to the domestic legislations.

These clarifications are important from a legal point of view, since currently foreign fighters join for the most part groups described by the United Nations as terrorists in the context of a non-international armed conflict following the example of the civil war in Syria. Thus, the foregoing makes it possible to situate, from a point of view of international humanitarian law who are the foreign terrorist fighters to be analyzed in this chapter.

Also with regard to the involvement of foreign fighters in an armed conflict, questions of international law relating in particular to the duty of prevention of the States of residence or origin of the FTF, obligations regarding the arrest of FTF or conditions relating to criminal prosecution of an individual who has committed crimes abroad are dealt with in detail in Kraehenmann's study, "Foreign Fighters under International Law", of the Academy of International Humanitarian Law and Human Rights in Geneva⁵¹⁰. This study also analyzes the problematic of the measures implemented in the fight against terrorism and their consequences vice versa of the notion of rule of law. Indeed, a number of studies on this subject analyze the human rights implications of the application of measures against FTF, such as the deprivation of nationality, the confiscation of identity and any other measures aimed at restricting individual liberties (prohibition of entry or exit from a territory, interception of communications, etc.).

In order to adapt the distinction made by Kraehenmann, it is still necessary to approach the concept of FTFs from two angles, namely the perspective of UN international law and the regional (European) international law. With regard to the United Nations body of law, Security Council resolutions 2170 and 2178 adopted in August and September 2014

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid.

respectively address threats to international peace and security resulting from acts of terrorism. These resolutions deal, in particular, with the concept of FTF and the threat that they may pose. It is worth recalling what has just been developed above that while these resolutions provide definitional elements that help to understand the concept of FTF in terms of the concerns of the UN Security Council, it is necessary to distinguish from a point of view of international law the notion of foreign combatant and the notion of the fight against terrorism. Indeed, the resolutions that will be mentioned below explicitly using the term foreign terrorist fighter do not draw the distinction between international humanitarian law (which deals with the notion of foreign combatant in the context of an armed conflict) and UN and regional international law (referring to United Nations resolutions and conventions or to Council of Europe conventions in the field of the prevention and suppression of terrorism). For example, resolution 2170 condemns ISIS, Al-Nusra Front and all other organizations affiliated with al-Qaeda for their terrorist activities in Syria in particular. This resolution calls on member states to fight terrorism in a comprehensive manner and reminds that the measures taken as a result must respect the international humanitarian law, the protection of human rights and the refugee law. After the attacks of September 11, 2001 in the United States, Western states have apprehended terrorism as an international phenomenon and not only national. Thus, the answers to this phenomenon have become international.⁵¹¹ With this resolution, the Security Council expresses itself with particular concern at the influx of foreign terrorist fighters joining the ranks of the Islamic State of Iraq and the Levant (ISIL) and the Al-Nusra Front (ANF) and all other individuals, groups, companies and entities associated with al-Qaida and the extent of this phenomenon. The Security Council condemns all recruitment activities as well as the financing or facilitation of the travel of foreign terrorist fighters. The Security Council therefore calls on all member states to take national measures to stop the flow of foreign terrorist fighters to join a terrorist organization and to deter individuals from joining such an organization abroad. In this context, for example, the Swiss Counter-Terrorism Strategy was adopted in September 2015, the aim of which is precisely to prevent any export of terrorism and any support for terrorism from its territory. The UN Security Council reiterates its concern about FTF in the resolution 2258 (2015), which it defines "expressing serious concern"⁵¹² by the terrible and growing threat posed by foreign terrorist fighters, ie individuals who travel to a State other than their State of

⁵¹¹ Ibid.

⁵¹² The Security Council regularly adopts the same rhetoric as a more recent resolution (2258) adopted in December 2015.

residence or nationality, with the intent to commit, organize or prepare acts of terrorism, or to participate in or to provide or receive training in terrorism, particularly in the context of an armed conflict [..]". In order to cope with this problematic, the Security Council reminds that all the causes of the phenomenon must be tackled, which implies detecting and preventing the processes of radicalization, recruitment and the fight against violent extremism result in terrorist activities. According to this resolution, it is also a question of promoting political and religious tolerance as well as economic development and social cohesion, also stopping and resolving armed conflicts and facilitating reintegration. It should be noted here that this resolution mentions the "Hague-Marrakech" Memorandum of the Global Counterterrorism Forum (GCTF) which addresses a series of good practices around four main themes, in order to ensure an effective response to the phenomenon of FTF, which are radicalization and violent extremism, recruitment and facilitation, travel and combat, and return and reintegration. Thus, apart from binding international law, it also contributes to the definition of the phenomenon of foreign terrorist fighters and the design of the responses to be provided. It will therefore be interesting to address these very general concepts with the presence of the analysis of foreign terrorist fighters from Switzerland as an example and to the possible extent to deconstruct these notions. With regard to the perspective of regional international law, the decisions of the Council of the European Union and the following Council of Europe Conventions also provide insight into the concept of FTF and complement the international legal framework originating from UN.

Thus, firstly at the level of the European Union, the Framework Decision of the Council (European Union) of 13 June 2002 on the fight against terrorism defines among other things what a terrorist group and condemns the participation in such a group (Article 2). This Framework Decision is the basis of the European Union's counter-terrorism policy and defines terrorist offenses in a harmonized manner⁵¹³. The 2008 Framework Decision⁵¹⁴ underlines the international dimension of the terrorist networks and the global response to them and encourages repeated attempts to combat recruitment and training for terrorist activities. Ultimately, the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States facilitates judicial cooperation within the European Union, in particular with regard to the prosecution of the FTF.

⁵¹³ See paragraph 2 of Council Framework Decision 2008/919 / JHA of 28 November 2008 amending Framework Decision 2002/475 / JHA on combating terrorism.

⁵¹⁴ Council Framework Decision 2008/919 / JHA of 28 November 2008 amending Framework Decision 2002/475 / JHA on combating terrorism.

Secondly, at the level of the Council of Europe, the 1977 Council of Europe Convention for the Suppression of Terrorism facilitates extradition and therefore the prosecution of foreign terrorist fighters. And it is the 2005 Council of Europe Convention for the Prevention of Terrorism that is most relevant to the FTF phenomenon. Article 6, for example, condemns recruitment for terrorism, which is, "soliciting another person to commit or participate in the commission of a terrorist offense or to join an association or organization group to contribute to the commission of one or more terrorist offenses by the association or group ". Also article 7 condemns training for terrorism. It should be noted that this text also promotes international cooperation in criminal matters between States Parties (Article 17). In the end, the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism adopted in Brussels in 2015 makes explicit mention of travel for the purposes of terrorism. Thus, article 4 condemns the fact of travelling abroad for the purpose of terrorism, namely "the fact of travelling to a State, which is not that of the traveller's nationality or residence, in order to commit or to contribute or to participate in a terrorist offense or to provide or receive training for terrorism "⁵¹⁵. This definition is clearly similar to the one that Security Council resolution 2178 referred to above and establishes regarding foreign terrorist fighters. Ultimately, Article 5 condemns the financing of foreign travel for the purpose of terrorism and article 6 condemns the organization or facilitation of such trips. For example, internationally Switzerland has ratified and implemented a number of additional counter terrorism conventions and protocols signed under the auspices of the UN⁵¹⁶. However, the Swiss penal system does not have a definition of terrorism and this result in many difficulties as regards the convictions and the sentences to be formulated against the defendants accused of the commission of terrorist activities. Also regarding the notion of FTF and travel for the purpose of terrorism, the Swiss legal system is even more incomplete and limited. On 22 October 2015 Switzerland signed in Riga the Additional Protocol to the Council of Europe the Convention on the Prevention of Terrorism, the Convention that Switzerland also signed in 2012, but not yet ratified. However, this protocol must still be ratified by Switzerland so that it can create a standard condemning travel for terrorism as well as the financing, organization and facilitation of such travel but also recruitment and training of terrorists⁵¹⁷. Legal gaps are therefore still observable at this level and the processes of ratification and implementation of these texts at the domestic level will require a few more years of work.

⁵¹⁵ Ibid.

⁵¹⁶ See these texts are listed in the "Switzerland's Counter-Terrorism Strategy" of 18 September 2015.

⁵¹⁷ Ibid.

The question of the different forms and options that criminal prosecution can take against foreign fighters who have joined an armed insurrection abroad is still worthy of mention here. One option is to prosecute the returnee suspected of committing or having been involved in the commission of war crimes or other international crimes during an armed conflict. These include the execution of civilians, the taking of hostages, acts of torture, sexual violence or the recruitment of child soldiers. For example, an FTF that has joined the ranks of ISIS is likely to have perpetrated such crimes in the Syrian conflict. As such, all countries that have ratified the Rome Statute of the International Criminal Court and transposed it into their national laws have the competence to prosecute perpetrators of war crimes, genocide, or crimes against humanity. Another option is to prosecute the foreign fighter by making it illegal to undertake a trip (see resolution 2178) to participate in an armed conflict abroad.

Kraehenmann concludes his study "Foreign Fighters under International Law" on the finding that violations of international humanitarian law cover all forms of terrorist acts in a situation of armed conflict. These violations are prosecuted as war crimes. But according to the author, prosecuting these same acts under national anti-terrorism laws does not adequately address violations of international humanitarian law⁵¹⁸. She takes the example of the Islamic State and its fighters responsible for serious violations of international humanitarian law in Syria and Iraq. However, much of the domestic criminal prosecution of FTFs focuses on terrorist offenses and participation in a terrorist organization. She believes that it is easier to do this rather than find the evidence which is extremely difficult to collect, that war crimes were potentially committed, but notes that it is problematic to address the issue foreign terrorist fighters solely in terms of the terrorist threat to countries of origin or residence. It is sometimes a question of repressing war crimes, sometimes of ensuring national security by fighting against terrorism.

This chapter thus demonstrating that the notion of foreign combatant is a source of stakes and debates on the level of international law and that it covering a relatively broad field. In addition, this section focused on the notion of foreign terrorist fighter adding a qualifier and therefore a specific dimension to the phenomenon of foreign fighters. It is this qualification that illustrates a shift between the notion of foreign fighters and that of terrorist fighters. Indeed, it is the current terrorist threat that is perceived as a priority and which causes considerable difficulties and challenges to prosecution authorities as well as judges in proving support or participation in a terrorist organization and to qualify a company as such.

⁵¹⁸ Ibid.

5.6 The new criminal figures foreseen in the Res. 2178 (2014)

It has been discussed of the qualification as terrorists of the foreign fighters according to the Res. 2178 (2014). In fact, in its paragraph 6 the decision requires States to criminalize the transfer to a country other than that of residence in order to commit, plan, prepare or participate in terrorist acts or for the purpose of providing or receiving terrorist training; the financing of these transfers; ultimately, the recruitment of subjects destined to move to other countries to commit acts of terrorism. It is therefore crucial, in relation to the above, to establish what interpretation should be given to the expression of acts of terrorism in the context of an armed conflict such as the Syrian example⁵¹⁹. It should be borne in mind that the most recent conventions on terrorism contain exception clauses which restrict their scope by excluding the activities of the armed forces during an armed conflict, as governed by international humanitarian law. One of the main reasons for not approving a global convention on terrorism is precisely the inclusion and content of a clause of this kind, essentially in relation to the question of whether and to what extent the simple participation in hostilities and acts of armed groups that are lawful under humanitarian law may fall within the scope of the global convention and therefore qualify as terrorists⁵²⁰. In fact, the most recent exception clause included in the Nuclear Terrorism Convention⁵²¹ is to be interpreted as meaning that the activities of the armed forces of a party only when governed by the law of armed conflicts, as a *lex specialis*, are not the subject of the convention.

The International Committee of the Red Cross (ICRC) highlighted that criminalization as a terrorist offense (and not as a crime as such) of simple participation in an armed conflict with a certain organized group would end up weakening the fundamental principle of equality of the belligerents, namely the equality of rights and obligations of the parties to an armed conflict, even of a non-international nature⁵²². In this sense, a possible reading of the outcome

⁵¹⁹ The question of the respective field of application and possible overlaps between international humanitarian law and the international legal framework to combat terrorism has been notoriously addressed by Italian jurisprudence, on which G. Dellamorte, and M. Mancini, 2009. Defining Acts of International Terrorism in Time of Armed Conflict: Italian Case Law in the Aftermath of September 11, 2001 Attacks, in the Italian Yearbook of International Law, p. 115 ss.

⁵²⁰ M. Hmoud, 2006. Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention, in the Journal of International Criminal Justice, p. 103

⁵²¹ UN Doc. A / RES / 59/290, 13 April 2005. UNTS, vol. 2445, p. 89. The art. 4 (2) reads: "*The activities of armed forces during an armed conflict, as those terms are under international humanitarian law, which are governed by that law. The next par. 3 states that "The provisions of paragraph 2 of the article are not to be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws".*

⁵²² J. Pejic, 2004. Terrorist Acts and Groups: A Role for International Law, in the British Yearbook of International Law, p. 71-75. It should be noted in any case that this provision does not impose a specific

of res. 2178 which correspond the obligations contained therein with the right of armed conflicts without resorting to the application of art. 103 of the United Nations Charter⁵²³, could be that of interpreting the expression 'terrorist acts', when carried out in the course of a conflict as violations of international humanitarian law. On the other hand, it is clear that the purpose of the measures introduced by the Security Council is that on the one hand to prevent and on the other to constrict trips to foreign territory to take part in armed groups considered as terrorists. In this sense, it was then observed that the resolution could be understood as solely applicable to the terrorist groups mentioned in paragraph 10, namely ISIL and Al-Nusrah Front; nevertheless, it cannot be said that the objective of this decision remains that of its general application⁵²⁴.

As noted, the res. 2178 was criticized the lack of a definition of terrorism, and for the risks of abuse that could derive regards the respect of the principle of legality and more generally of human rights despite the continuous reference to them in different passages of the decision. As for its implementation at the national level, the major doubts concerned both the indeterminacy of the case and the increasingly marked anticipation of criminal protection to preparatory acts ever more remote compared to future acts with terrorist purposes. In this sense, it has been stressed that, since this is a specific case of double malice, they are characterized by accentuated subjectivism, with the consequent difficulties of proof of malice⁵²⁵.

5.7 The concept of prevention

As for the preventive implements, the res. 2178 reaffirms the obligation to prevent terrorists and groups movements through border controls and the issuing of passports, as well as through measures to prevent counterfeiting, falsification and fraudulent use of the same⁵²⁶. It

obligation to grant, at the end of the hostilities, a general amnesty, but only a generic commitment. See N. Ronzitti. *International Law of Armed Conflicts*, , P. 341.

⁵²³ On the subject of the invocation of the art. 103 of the Charter of the United Nations in the framework of the anti-terrorist measures , see. L. Gradoni, M. Meccarelli, P. Palchetti, C Sotis , 2011. *The dark side of article 103 of the Charter of the United Nations, The rules of the exception. An interdisciplinary dialogue starting from the question of terrorism*, Macerata, p. 263 ss.

⁵²⁴ S. Kraehenmann, 2014. *Foreign Fighters Under International Law*, cit. p. 11.

⁵²⁵ A. Cavaliere, 2015. *Critical considerations around the anti-terrorism in ccontemporary ccriminal law*, n. 7 p.11.

⁵²⁶ According to one of them, some of the measures set out in 2178 - clearly excluding those that require the criminalization of certain behaviours - would produce direct effects in the internal legal systems: in reality, what cannot be excluded, in our opinion, is that certain rules contained in the resolution are self-executing. See A. Peters, 2014. *Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person*, Part I, EJIL Talk .

should be recalled that the due carefulness obligations⁵²⁷ take all practicable measures to prevent international terrorism. This is already contained in instruments of a contractual nature and then reaffirmed by the Security Council starting from the res. 1373 (2001), constitute the further specification of the principle of general international law, to protect state sovereignty⁵²⁸. Which is obliges the State to not knowingly allow its territory to be used for acts contrary to the rights of the other States according to the authoritative definition of the International Court of Justice in the affair of the *Strait of Corfu*⁵²⁹. The well-known Declaration of the General Assembly on friendly relations and cooperation between states of 1970, which preserved based on the principles of non-intervention in internal affairs and prohibition of the use of force in international relations, the obligation not to tolerate on its territory organized activities directed to the commission of acts of terrorism in another State⁵³⁰. Control of the terrorist movement must therefore be included in the scope of prevention measures⁵³¹. The Res. 2178 would seem to pursue a dual objective: not only to prevent the transfer of foreign fighters to destinations in which to carry out terrorist activities, but also to protect the countries of origin of nationality or residence, in particular with respect to the threats represented from recruitment activities⁵³².

A fundamental instrument of prevention is the detection of the movements of suspected terrorists and the sharing of information between states. In addition to the controversial issue of the acquisition of passenger data when booking travel⁵³³, is a fundamental element of the res. 2178 concerns the acquisition and transfer of information on a bilateral and multilateral basis in order to monitor and prevent transfers. In this context, the Security Council encourages Interpol to make a contribution to strengthening cooperation between States⁵³⁴. In

⁵²⁷ R. Barnidge, 2008. Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle, The Hague.

⁵²⁸ K. Trapp, 2011. State Responsibility for International Terrorism, Oxford, p. 64.

⁵²⁹ ICJ, Corfu Channel (United Kingdom v. Albania), ruling of 9 April 1949, in ICJ Reports 1949, p. 4 ss. on p. 22: The obligation for the whole State not to let its territory be used for purposes contrary to the rights of other States".

⁵³⁰ UN Doc. Res. 2625 (XXV) of 24 October 1970.

⁵³¹ Ruys, Tom, 2014. "Of Arms, Funding and 'Non-lethal Assistance': Issues Surrounding third-State Intervention in the Syrian Civil War." Chinese Journal of International Law 13.1, p13–53.

⁵³² In May 2015, the Executive Directorate of the UN Counter-Terrorism Committee sent the first of a series of three reports on the state of implementation of the resolution to the Security Council. 2178 by the States most affected by the threat of foreign fighters: v. UN Doc. S / 2015/338, May 14, 2015.

⁵³³ On the existing gaps with respect to the use of passenger data acquisition systems, see the recommendations made by the Committee against Terrorism itself: UN Doc. S / 2015/377, Gaps in the use of the advance passenger information and recommendations for expanding its use to stem the flow of the foreign terrorist fighters, 26 May 2015.

⁵³⁴ In confirmation of the growing importance of this international organization in the exchange of information between States, Interpol Secretary General Jurgen Stock highlighted during an intervention to the Security

this regard, it should be noted that there are different measures that the European legislator has provided for the protection and activities of intelligence agencies, including the possibility for information and security services to conduct investigative interviews with detainees in order to prevent acts with terrorist purposes. It also responds to the need for nationwide coordination of investigations into criminal proceedings and terrorism prevention procedures.

In the European context, several States have introduced measures relating to the withdrawal of residence permits and travel documents⁵³⁵. A major concern is the initiatives undertaken by various countries not only to temporarily exclude their citizens from the territory⁵³⁶ but above all to regulate the circumstances in which revocation of citizenship is possible as an instrument to prevent the return of foreign fighters in their territory. The issue was debated in relation to the broad powers that the British government exercised in depriving terrorists of suspected citizenship, even if there was a risk of statelessness⁵³⁷.

5.8 Further actions & new resolution by the UN Security Council

The question is what should be done to deal with the threats posed by the return of foreign terrorist fighters, are the necessary measures issued by international bodies, such as Security Council resolution 2178, sufficient or should specific measures be put in place to address the returns of foreign fighters?

The biggest issues that the countries where these fighters will return is the danger of not detecting them at the entrance. If they manage to join the countries anonymously, they will then have the necessary time to build the networks of a secret life (false papers, hideouts, networks of supply) and then become more and more out of reach of the security services⁵³⁸. Therefore, great attention is required at the level of border posts, particularly with regard to the use of false or forged documents as requested by the UN Security Council⁵³⁹. The

Council that the number of profiles registered in its databases has passed from less of 1,000 to 4,000 foreign fighters from the time of the adoption of the res. 2178 to May 2015. See UN Doc. S / PV.7453, 29 May 2015.

⁵³⁵ P. Bakowski- L. Puccio, 2015. Foreign Fighters: Member States' Responses and EU Action in an International Context, European Parliament Research Service. Also L. Vidino- L. Pighi, A. Snetkov, 2014. Foreign Fighters: An Overview of Responses in Eleven Countries, Zurich.

⁵³⁶ K. Roach, 2015. Thematic Conclusions and Future Challenges, in Comparative Counter-Terrorism Law, Cambridge, p. 683-684.

⁵³⁷ G. Goodwin-Gill, 2014. Mr. Al-Jedda Deprivation of Citizenship and International Law, Information Paper submitted to the UK Parliament.

⁵³⁸ Abdelhak Bassou, 2017. Returning foreign terrorist fighters: An imminent threat to manage, Policy Centre for the New South.

⁵³⁹ Resolution 2178 (2014) adopted by the Security Council at its 7272nd session on 24 September 2014, states in its recommendation No. 2 that the Council: "Reaffirms that all States must prevent the circulation of terrorists

methods and techniques used by foreign terrorist fighters make the job of frontline officers very difficult, especially at borders points requiring particular and very advanced training⁵⁴⁰. Such measures, however, face obstacles due in large part to the financial resources that these measures required. Every country has neither had the same means nor the same capacity to install at their borders devices which capable of detecting forgery and counterfeiting documents. Since the threat is worldwide, the chain of international security is disrupted as soon as one of its links fails. According to the report of the Counter-Terrorism Committee of the United Nations Security Council only 51 countries, or about a quarter of all UN members, have a prior information program on travellers, this means have advance system for the security of borders and airspace, and to detect the arrival or departure of potential foreign terrorist fighters. The report adds that only half of these 51 states use these systems in practice⁵⁴¹.

Development aid in the context of human security will have to consider this aspect into account in order to offer part of the aid to secure borders and implementing advanced checks. Donors must also ensure that a part of their loans and donations are devoted to measures in order to prevent and limit the free movement of terrorists including foreign terrorist fighter.

One of the difficulties facing the government policy makers is how to deal with the issue of returning foreign fighters whether to choose between suppression, reintegration, or a combination of both approaches. In fact, this group of people can be labelled together under a single criterion as representing a group of people that travelled outside of a country institutional framework to take part in acts of non-legitimate fighting in a third country. However, it would be neither reasonable nor fair to deal with them in one standard way that would apply to the whole despite the differences that shows their levels of involvement. Upon the return of the FTF, they can be classified at least by three categories according to their involvements⁵⁴²:

- The first group of FTF returnees will be classed as an extension and the remaining of the armed division of terrorist groups;

and terrorist groups by carrying out effective border controls, closely monitoring the issuance of identity and travel documents, and taking measures to prevent falsification of identity and travel documents, forgery and fraudulent use such documents.

⁵⁴⁰ By way of example, the letter dated 13 May 2015 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning the fight against terrorism to the President of the Security Council states: "When travelling foreign terrorist fighters often try to blur the trail, including dividing their trip in stages to prevent border control officials from determining where they actually come from. There is a need to define concrete methods without delay, the application of which will make it possible to substantially improve the ability of agents to identify suspicious multi-stage journeys".

⁵⁴¹ Ibid.

⁵⁴² Ibid.

- The second group FTF returnees will be classed as the followers and supporter of the group to continue extending the jihadist ideology and;
- The third group FTF returnees will be classed as vulnerable and being victims as a result they have suffered by the terrorist groups.

Not only should the reactions of governments have to be adapted into appropriate policies to reduce risks, but also consider public opinions and accepted expressions too. The governments should also differentiate between the levels of involvement of these returning fighters and avoid taken any inappropriate measures. States sometimes find it difficult to decide between the lawfully correct and the popular preferences dictated by the subjective and the emotional.

In Tunisia, on Thursday, December 28, 2016, while President Beji Caid Essebsi was discussing with his head of government plans put in place by the government to deal with the issue of Tunisians returning from hotbeds of tension, "political parties have put in place guard against any secret or announced agreement which favours their return. These parties recalled that these Tunisians constituted "a real danger to national and regional security". Some protesters went so far as to demand the revocation of the nationality of these fighters to prevent them from returning to Tunisia. The Tunisian government is therefore faced with the dilemma of dealing in a legal framework with nationals who have broken the law and committed crimes or respond to popular subjectivities that dictate extreme and quasi-illegal measures. However, the UK have found a middle approach⁵⁴³: The British law allows in some cases for the judges to cancel the passports of the British nationals gone to fight abroad and to insert them in the lists of the persons prohibited to borrow the flights to the United Kingdom. The person concerned must then return home to seek the authorization of the UK authorities. This allows these authorities to study the case, such as to issue a visa and assess the case before the person enters the territory of the Kingdom⁵⁴⁴. These people are not, as the Tunisian demonstrators demand, deprived of their nationalities; but only obliged to go through a return authorization. Opting for routine and extreme suppression cannot, from the point of view of some experts, describe the appropriate explanation⁵⁴⁵. Constrictive and oppressive policies discourage fighters who they know of their mistakes and have rebelled against the barbaric acts of ISIS and ANF and chosen regret and return to their country of

⁵⁴³ Melanie Gower, 2015. "Deprivation of British Citizenship and Withdrawal of Passport Facilities," House of Commons Library.

⁵⁴⁴ Ibid.

⁵⁴⁵ Charles Lister, 2015. *Returning Foreign Fighters: Criminalization or Reintegration?* », Brooking Institution U.S.A. and Brooking Doha Centre, Qatar.

origin. Such policies also minimise the involvement of their families to encourage the terrorist members to return who have committed to terrorist organizations because for fear that they will be punished to heavy sentences without appropriate study of their cases and without differentiating between those as classified above. Any misrepresentation or extreme and cruel treatment can only generate injustices that can in turn be reasons of radicalization and future violence. On the other hand, also there should be no automatic amnesty policies on simple regretful statements by the fighters who want to return. As this could allow terrorists using the Taqqia⁵⁴⁶ technique to conceal their intention and get away the required controls. The answer to the above issue can therefore be the combination of both approaches repression and rehabilitation. Also the report entitled "returning foreign fighters: criminalization or reintegration"⁵⁴⁷; explains the dilemma facing Europeans in dealing with the foreign terrorist combatants in these terms, and concludes that it is necessary to combine both above approaches. Generally, western states have adopted approaches to deal with FTFs that are mainly "hard" or "liberal." While both hard (criminalization) and liberal (rehabilitation and reintegration) policies have their advantages and disadvantages, but by combining both approaches then we would be in a better position to achieve a very good understanding and outcomes for this issue. The government's bodies and the community should work together and closely to create places and opportunity to those foreign terrorist fighter and their families whom wants to return to their country of origin. The foreign terrorist fighter who makes the promise to return to his country or is interrupted at the border will have to be taken to particular campus where his regime is not that of a prisoner, but of a person whose status is to be verified⁵⁴⁸. In this case, the returning candidate will be checked by a number of experts (judges, psychologists, sociologists, intelligence specialists, etc) who will be decide whether the person concerned should be assigned to civil or governmental organizations that must help him to overcome the suffering of the living conditions in which he has evolved during his stay for example in Syria or Iraq and therefore assist his reintegration; or should be assigned to the intelligence services for debriefing and possible participation and ask the judicial services for instruction in appearance before the courts. In addition, the families,

⁵⁴⁶ Technique that allows terrorists, especially those who are in the process of taking action, to hide their intentions: The terrorist can then begin to act normally; He shaves his beard (removes the veil for women), banishes his radical language, no longer frequents mosques, drinks alcohol in a box, etc. Everything is done to deceive those who watch him. The Taqqia is for the terrorist organizations an art of war which they teach in the smallest details during the training of the recruits.

⁵⁴⁷ Charles Lister, 2015. *Returning Foreign Fighters: Criminalization or Reintegration?* », Brooking Institution U.S.A. and Brooking Doha Centre, Qatar.

⁵⁴⁸ Rachel Briggs and Tanya Silverman, 2014. "Western Foreign Fighters: Innovations in Responding to the Threat," Institute for Strategic Dialogue.

friends and relative of foreign terrorist fighters, can also play an important role in the dealing of these people when they return to their countries of origin. This is including encourage and convince them to returns while many of these fighters, remained in contact with their families after their departure. The families and relatives can also play an important role in reintegrating those foreign terrorist fighters and involving them again into society⁵⁴⁹.

Finally, many provisions of Security Council Resolution 2178 on foreign terrorist fighters can be applied by States to encourage new methods for the return of this category of individuals. Certain procedure such as those taken at borders to avoid the exit of fighters to Syria and Iraq can also help in identify returns. However, the issue of returns would require the new and improved Security Council resolution⁵⁵⁰. This is due to the fact that the new resolution would help and encourage states to consider the threat more seriously and detain those dangers fighters who they were involved in fighting. On the other hand, the new resolution would provide as guidance and encourage universal foundation for making national and regional measures. However, it would be appropriate for a potential resolution to be made to set stronger emphasis to international cooperation, especially to help those countries that cannot carry out certain methods in order to meet the concerns of the community on the problem⁵⁵¹.

5.9 Conclusion

The adoption of the resolution 2178 by the Security Council with the challenges posed by its implementation in the national legal systems ⁵⁵² summarises many of the themes of the difficult collective response to international terrorism⁵⁵³. An assessment of the UN contribution in countering terrorism highlights and shadows as if almost every result achieved is almost mirroring a failure. Firstly, in the face of the unanimous agreement around the condemnation of terrorism in all its forms and manifestations to its classification as a threat to peace and international security, the question of definition still remains unsolved. Secondly,

⁵⁴⁹ Griff Witte, 2014. "Westerners Fighting in Syria Disillusioned with Islamic State but Can't Go Home," Washington Post, 12 September 2014,

⁵⁵⁰ Jurgen Stock, "Statement before the United Nations Security Council Ministerial Briefing on Foreign Terrorist Fighters" (speech, U.N. headquarters, New York, USA, May 29, 2015).

⁵⁵¹ Ibid.

⁵⁵² See also the statement adopted by 48 ministers of foreign and interior affairs on 28 July 2015, following a summit convened in Madrid by the Spanish Government, on the occasion of the special meeting of the UN Counter-Terrorism Committee dedicated to the theme of foreign fighters.

⁵⁵³ See L. Van Den Herik , N. Schrijver, 2013. Counterterrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges, Cambridge.

while recognizing the decisive role of the Security Council and to a lesser extent, the General Assembly, in designing construction of measures to combat terrorism, the legislative power of the Council continues to be problematic on various levels. Thirdly, even in the presence of a complex series of international obligations to combat terrorism, also confirmed by broad adherence to the anti-terrorist conventions, there is in fact no adequate control over their implementation by the States aimed at ensuring their effectiveness and exclude abuse. Fourthly, although after September 11, 2001 the United Nations made a positive contribution to the emergence of the concept of the prevention of terrorism in order to deprive terrorists of access to resources, means and places to carry out their activities, it emerged dramatically the issue of legal coordination between the measures envisaged and other rules of international law starting with humanitarian law up to those protecting human rights, where the argument of the binding nature of Security Council decisions has often been used to justify the sacrifice of rights guarantees fundamentally⁵⁵⁴. In the background, there is the theme of the fight against radicalism and extremism⁵⁵⁵, also present in the Res. 2178 on which States and international organizations are certainly called to greater effort.

⁵⁵⁴M. Scheinin , M. Vermeulen , 2010. Unilateral exceptions to International Law: systematic legal analysis and critique of doctrines that seek to deny or reduce the applicability of Human Rights norms in the fight against terrorism, EUI Working Papers LAW No. 2010/08.

⁵⁵⁵ See also the I pillar of the global counter-terrorism strategy, adopted by the General Assembly, UN Doc. A / RES / 60/288, The United Nations Global Counter-Terrorism Strategy, September 8, 2006.

Chapter Six

Summary & Conclusion

6.0 Introduction

On the beginning of the 21st century, the phenomenon related to terrorism has showed unique characteristics along with defining trends. The importance of any study concerning the determination, accuracy and definition of a term with a legal dimension, in this case "the terrorist act", is measured in its ability to include the concept and the perspectives it represents in the whole and taking into consideration all the elements liable to spread out into the perception and understanding. This thesis is not claiming to be so exhaustive but allowed to perceive the terrorist act from a different angle and in a new perception. A study does not always consist of finding solutions, but also asking new questions or updating existing means. While the purpose of any study is obviously to find answers first, however, the national and international solutions adopted so far for the problems inherent in the notion of terrorism and terrorist acts have not provided any clear legal framework for phenomenon and not answered the permanent examinations in the subject.

This thesis, chapter one and two, has already examined the conceptual and legal difficulty involve in the search for the generally accepted definition of the term of terrorism. The objective of terrorism and guerrilla warfare may well be the same; but they are distinguished from each other by the targets of their operations⁵⁵⁶. A legitimate cause does not act legitimate the means and methods utilized; therefore, the third chapter examined peoples actively pursue their right to self- determination, and the relationship between the struggle for self determination, liberation movements and terrorism.

The fourth chapter of this thesis turned to the legal issues of the accurately criminalising international terrorism. The terrorist offense remains at present an unspecific crime under international law despite the existence of several global conventions on counter-terrorism. Terrorism is a serious crime and it is exercised by transnational anti-state groups that often target civilian populations and government institutions. The definition of armed aggression refers to acts of terrorism acting on behalf of an aggressor State under its control against the territory, property, civilian population or members of the diplomatic staff of another State.

⁵⁵⁶ Alex Schmid, 2004. Terrorism - The Definitional Problem, 36 Case W. Res. J. Int'l L. 375.

Terrorist armed aggression therefore depends on a state decision. Judges of the ICJ concluded in the judgment of 27 June 1986 that the provision of material, financial and logistical support to groups engaged in acts of terrorism abroad, without the Aggressor State having direct control over such acts remains an unlawful act and not an armed attack. However, after 11 September 2001, any aid, funding, and support to terrorist groups would be qualified as terrorist offenses under international law, European provisions and national criminal law. Different offenses of organized crime, serious terrorist acts, systematic and organized, directed against the civilian population and committed by a state or an organization, could be qualified as crimes against humanity⁵⁵⁷. On the way to include terrorist organizations now that the group of criminals was prolonged the attacks on September 11 could be ideally viewed as a crime against humankind. According to some researchers, terrorism crime is the crime that is against humanity is the most appropriate in order to tackle terrorist crimes along with the international fundamental crimes. The main requirement against humanity is eventually that the unlawful act should be dedicated as a part of an extensive or methodical attack focused against a civilian people. The entire state, or in this situation the non-state actors, should not essentially accept a policy or strategy as the official policy. The word terrorism is not a new occurrence; by organizations as well as individuals trying to achieve political goals and objectives it has long been a process of violent action.

However, international terrorism is different from anything called organized crime. If acts of terrorism are planned, financed and perpetrated under the sponsorship of one State against another State, such acts may be characterized as acts of State armed aggression by the Security Council, which could in such cases to decide to react based on the Charter, including the principles of collective security, in order to protect international peace and security. In a state of war, terrorist offenses can be characterized as war crimes or crimes against humanity, as several internationalists have pointed out. In this case, the ICC may try suspected terrorists. The absence of a single classification of terrorist offenses reflects the weakness of the international system and the obvious legal gap in the international law. On the other hand, it has led to the strengthening of cooperation at both the international and regional levels, and has led States to develop their own national legal provisions and their domestic jurisdictions, which remain the only competent authorities in the field of terrorism.

⁵⁵⁷ Gilbert Guillaume, 2003. *The International Court of Justice at the early of the twentieth century: the analysis of a judge*, op. cit., p. 255-259.

In this modern era there is a rise in terrorist organizations and groups, different in their political goals and objectives along with geographic roots. One unifying variable will be faced by all these organizations their deep confidence on the usage of violence against civilians population in order to accomplish their goals and objectives. So as to distinguish between actions those are authorized by a government (and thus "lawful") in addition to those of other actors, together with individuals and minor groups. For instance, bombing with missiles with an enemy country, which is well-designed in order to affect civilian provision for a cause, so would not be considered as terrorism when it is allowed by government. This standard is fundamentally difficult and is not completely accepted since the existence of state terrorism is denied by this; the very same act might or might not be categorized as terrorism liable on whether its support is outlined towards a "legitimate" government; "legitimacy" as well as "lawfulness" are particular, completely depending on the viewpoint of one single government or another government; along with it deviates as of the historically acknowledged meaning and source of the term.

The fifth chapter of this thesis analysed the concept of foreign terrorist fighters at the framework of International Law. The adoption of the resolution 2178 by the Security Council with the challenges posed by its implementation in the national legal systems⁵⁵⁸ summarises many of the themes of the difficult collective response to international terrorism⁵⁵⁹. An assessment of the UN contribution in countering terrorism highlights and shadows as if almost every result achieved is almost mirroring a failure. Firstly, in the face of the unanimous agreement around the condemnation of terrorism in all its forms and manifestations to its classification as a threat to peace and international security, the question of definition still remains unsolved. Secondly, while recognizing the decisive role of the Security Council and to a lesser extent, the General Assembly, in designing construction of measures to combat terrorism, the legislative power of the Council continues to be problematic on various levels. Thirdly, even in the presence of a complex series of international obligations to combat terrorism, also confirmed by broad adherence to the anti-terrorist conventions, there is in fact no adequate control over their implementation by the States aimed at ensuring their effectiveness and exclude abuse. Fourthly, although after

⁵⁵⁸ See also the statement adopted by 48 ministers of foreign and interior affairs on 28 July 2015, following a summit convened in Madrid by the Spanish Government, on the occasion of the special meeting of the UN Counter-Terrorism Committee dedicated to the theme of foreign fighters.

⁵⁵⁹ L. Van Den Herik, N. Schrijver, 2013. Counterterrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges, Cambridge.

September 11, 2001 the United Nations made a positive contribution to the emergence of the concept of the prevention of terrorism in order to deprive terrorists of access to resources, means and places to carry out their activities, it emerged dramatically the issue of legal coordination between the measures envisaged and other rules of international law starting with humanitarian law up to those protecting human rights, where the argument of the binding nature of Security Council decisions has often been used to justify the sacrifice of rights guarantees fundamentally⁵⁶⁰. In the background, there is the theme of the fight against radicalism and extremism⁵⁶¹, also present in the Res. 2178 on which States and international organizations are certainly called to greater effort.

Furthermore, the United Nations Security Council in response to the terrorist phenomenon considered that all forms and manifestations of terrorist act constitute one of the most serious threats against international peace and security. However, this formula does not attribute any effective legal framework to the terrorist act. For this reason, it seems unlikely that an effective legal definition of the terrorist act will emerge promptly in international criminal law. This is due to the following reasons detailed in this thesis:

International politicians are turning a blind eye in separating political ideology from terrorist action for technical, practical and political reasons. This complicates any attempt to give an effective legal consideration to the terrorist act and leads the international community to enter into violence against each other. The equation is, however, obvious a terrorist act that does not carry a political aims is a criminal act subject to common law even if the means used and the procedure adopted are the same for both acts. Moreover, a terrorist act cannot be qualified as such if it does not carry a terrorist intent. The specific terrorist intent of the terrorist act presupposes that the perpetrator is not only aware that terror could result from his actions, but it is also specifically the consequence that he expects⁵⁶². The effectiveness of terrorist attack is not enough; terror must be the main purpose and intention of the terrorist. The terrorist act is indeed the combination of a political aims and the terrorist means used. Their gravity is such that the perpetrators of these acts cannot enjoy the favours' or privileges sometimes

⁵⁶⁰ M. Scheinin, M. Vermeulen, 2010. Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight Against Terrorism, EUI Working Papers LAW No. 2010/08.

⁵⁶¹ See also the I pillar of the global counter-terrorism strategy, adopted by the General Assembly, UN Doc. A / RES / 60/288, The United Nations Global Counter-Terrorism Strategy, September 8, 2006.

⁵⁶² ICTY, Galic case (Sarajevo), IT-98-29, decision of 3 October 2002, S32 and judgment of 5 December 2003; S136.

enjoyed by political crimes that can be partially amnestied. The combination of the political purpose and the objective of terrorizing the population seem sensible insofar as both are necessary to identify the terrorist act. One cannot imagine a terrorist act without the objective of terrorizing the population. Moreover, the political nature of the violence or the act committed reveals a desire to obtain radical, political or ideological results, thus excluding from the category of "the terrorist act" any offense committed for a purely profitable purpose that it falls under common law.

The continue confusion between terrorist offense, political offense and common law offense leads to the impossibility of interpreting the legal nature of the terrorist act. The political offense, because of its general nature, can take the form of a terrorist offense if one relies on the means used and the procedure adopted. Thus, the absence in the national and international criminal systems of a body of law of the political offense leads to multiple points of difference to an almost impossibility of agreement between States and highlights the difficulty encountered in international law to understand the notion of terrorism and to develop a legal and effective definition of the terrorist act.

The combination to introduce the notion of terrorist act and some legitimate legal concepts such as the right of peoples to self-determination and self-defence reduces the border between the legitimate and the illegitimate and leads to the difficulties of classifying the act terrorist among criminal offenses. The existence of the notion right of peoples to self-determination in the form of exclusion clause in regional anti-terrorist conventions and in the form of safeguard clause in sectoral international anti-terrorist conventions, as it is governed by international humanitarian law is applicable to international armed conflicts. Members of national liberation movements enjoy the status of combatant; there is no legal interest to put an end to the conceptual agreement between the concept of terrorist act and the right of peoples to self-determination. Similarly, self-defence like the notion of the terrorist act has being ambiguous, vague and ill-defined. In the field of anti-terrorist action, self-defences raises a number of issues. The first relates to the problem of the classification of aggression in relation to these acts. The second concerns the difficulty of identifying the *actus rea* elements that constitute a terrorist action before it reaches its objective. The third relates to the problem of the durability of the current tendency to broaden the notion of self-defence in the field in order to neutralize the act of aggression and repression on the territory of a third State. The fourth part deals with the problems of self-qualification, the extensive interpretation of the concept of self-defence, its extension into legitimate self-defence and its use in the face of

armed aggression by non-State groups. This calls into question the adaptation of the concept of self-defence to new international and irregular conflicts and highlights the cooperation between self-defence and state terrorist acts.

The criminal responsibility of States and their leaders for terrorism is not precisely established in clear and concise texts. This is the difficulty in establishing an effective legal regime for the terrorist act and in establishing the responsibility of the perpetrators since individual terrorist acts are often sponsored, financed or supported by individuals and States. In this context it is of interest to the international community is the evolution of international law and respect for the right to self-determination of peoples. Thus it is necessary to define the principle of compulsory jurisdiction for all differences, both political and legal, and to give international bodies the means to ensure its obligatory execution. The interdependence of States in all fields, especially political, legal and economic, is an essential factor that favors the creation of a compulsory international jurisdiction.

The terrorist phenomenon, since its emerge, has a heavy emotional and political burden. In this sense, the UN Special Rapporteur on Terrorism confirms that "the term terrorism has a very high emotional and political burden. In general, this term implies a negative judgment and is used selectively"⁵⁶³. The term systematically has a pejorative connotation and is thus used for political purposes. Moreover, the subjectivity of the very notion of "terrorism" increases the difficulty of apprehending it objectively and academically. The definition of "terrorist act" is inherently controversial. It is all the more complex because it seems almost impossible to formulate it without resorting to value judgments. The emotional field of the expression "terrorist act" is so broad whether at the level of its own definition (terror, intimidation ...), at the level of the feelings it leaves on its direct or indirect victims, or at the level of its impact and the message that the terrorist seeks to transmit in society, that it does not find an effective definition in criminal law.

The problem posed by the definition of the terrorist act being more political than legal, in the face of crime with identity and political consequences, there will be always multiple points of variances in its perception and its comprehension. This subjective understanding has lead to the multiplication of definition that is subject to political interests and an ideological perception. Only legal and moral requirements and their stability will succeed in putting an

⁵⁶³ UN Sub-Commission on the Promotion and Protection of Human Rights, Terrorism and human rights Final report of the Special Rapporteur, Kalliopi K. Koufa, 25 June 2004, E/CN.4/Sub.2/2004/40.

end to the anarchy that prevails in the definition and description of terrorist acts. Despite the differences in positions on these vital issues, the international community must demonstrate its willingness to continue its efforts to achieve a political climate and international relations for peoples' peace and security.

The approach adopted in this study explaining the semantic development of the notion of terrorism and the doctrinal beginning of the notion of the terrorist act until its national and international legal re-establishment while recalling its origins and the complexity that accompany it. In the face of terrorism, it is impractical to use categorisation and to confront them in the name of "the fight of the good against evil ". These processes have demonstrated, moreover, their inefficiency at the legal, political and military levels and if we condemn terrorism, we need to condemn all terrorism.

Finally, while it might be suggested that it is irrelevant to find a universal and effective legal definition of the terrorist act, but punishment remains the only way to deal with this phenomenon. In this respect, international law is the sole guarantor and it is up to the international community to adapt, update and modernize it in the face of new perception of terrorism.

6.1 Key Findings of the Research

- There is no specific, unique and internationally agreed definition of the concept of terrorism.
- The political factors have an important and effective result on the expansion of terrorist operations. The political difference and the domination of a state over another state or group in another category, whether political or religious, plays an important role in the terrorist operations as well as the multiplicity of religions parties and differences in the ruling regimes .
- The economic factors have also contributed greatly to the exacerbation of the phenomenon of terrorism and the spread of geographical area that extends this phenomenon.
- Social factors are no less than the previous in terms of importance, social injustice and family disintegration and every person working in the absence of a scrutinize are all factors are a key factors in the spread of terrorism and wide and reflect the role negatively on the country and this in turn due to the lack of employment, equal opportunities and the existence of terrorist groups for disintegration Family.

- Inadequate contribution of the media in conveying the true picture of this phenomenon.
- The association of terrorism with other illegal acts and activities that assist in its growth, including organized crime, human trafficking, money laundering and illicit trafficking in arms and explosives, must be eliminated or at least reduced in order to combat terrorism.

6.2 Recommendations

Based on the above summary and findings, this thesis proposes a number of recommendations and measures aimed at improving the international legal framework for combating terrorism. These recommendations are outline below;

- 1- The necessity of criminalizing and prosecuting these terrorist acts because of the grave consequences for international and internal societies by criminalizing the preparatory acts of these crimes and initiating them as a complete crime.
2. The need to develop a comprehensive definition of terrorism since the absence of a unique definition of terrorism hold back international efforts to combat it on the one hand, and raises the confusion between terrorism and other phenomena that may be legitimate in themselves, such as self-defence and legitimate resistance to occupation and the right of peoples to self-determination.
- 3 - The necessity to reduce ignorance and unemployment if it cannot eliminate it completely. There is no doubt that ignorance and unemployment constitute the appropriate ground for the growth of the phenomenon of terrorism and propagation, as well as religious awareness of individuals intellectually and religiously.
4. The need for effective measures to be taken by the cohesion of individuals and the security services to combat and report terrorist crimes, the perpetrators of the crimes and the guidance of their places of gathering and the storage of their weapons.
5. The need to activate measures to prevent terrorists from possessing weapons of mass destruction and possessing means of transport should be activated and States should tighten controls on land and sea borders to avoid the infiltration of weapons or suspected persons.
- 6 - The need to focus on the procedures to eliminate terrorist organizations and prevent production and proliferation by eliminating the factors that constitute productive ground for the growth and prosperity of terrorist cells.

- 7 - The need to control the persons suspected of coming from abroad through aircraft and ships can be drawn from their passports and consulates must be warned after the prevention of entry visa to the country for suspects and must control foreign citizens coming from a country hosting terrorism and exports to other countries.
- 8- The necessity of activating the policy of criminalization of the subsequent preventive by combating the establishment of terrorist organizations and preventing the provision of aid and assistance to them and the confiscation and resolution of their funds.
9. The necessity of activating the role of the visual and invisible media in dealing with the claims of terrorists of the legitimacy of their misdeeds to establish guidelines for press and media reports in this regard, the peoples of the dangers of terrorism.
10. The necessity of activating the role of the visual and invisible media in dealing with the allegations of terrorists of the legitimacy of their wrongful acts of establishing guidelines for media and press reports in this regard, thus increasing communication with the media in order to improve people's awareness of the dangers of terrorism.
11. Establishment of an international system of compensation for victims of terrorist crimes.
12. The establishment of civil liability for terrorist crimes and the obligation of the State involved in the repair of the damage caused by this crime.
13. The need for States to strengthen the punishment for the preparation and initiation of terrorist crimes and to adopt restriction penalties for execution.
14. The need of all members at the United Nations and in particular Muslim and Arab countries to enact a law to deal with terrorism issues in a manner that protects the safety of all citizens and international countries, in particular preserves their security and protects the personal freedoms of individuals.

6.3 Mapping of Contribution

Original contribution to knowledge in the field	Chapter of Contribution
Theoretical framework approach, this is in order to understand the complications involved in the meaning formation of the notion of terrorism. Since this understanding is an initial step towards overcoming the confusion that overcomes at the international scene <i>vice versa</i> acts of violence that some countries view as “terrorism” while others do not. This thesis progress the discussion a step further then was the case in previous literatures on the subject.	Chapter 1 & 2
Examined peoples actively practise their right to self- determination and the linkage between Terrorism, the right to self-determination and Liberation Movements (a linkage not full exploded in previous literature).	Chapter 3
Exploration the legal issues of the accurately labelling and criminalising international terrorism. Also comparing International Terrorism with other crimes such as armed aggression and organised crimes.	Chapter 4
Discussion of the use of the concept of Foreign Terrorist Fighters at the framework of International Law. The adoption of the resolution 2178 by the Security Council with the challenges posed by its implementation in the national legal systems summarises many of the themes of the difficult collective response to international terrorism. An assessment of the UN contribution in countering terrorism highlighted. Recommendation for greater clarity regarding the concept of foreign terrorist fighters as well as sufficient procedural safeguards for assessing the selection and labelling of whom is the foreign terrorist fighter.	Chapter 5
Recommendations based on research findings.	Chapter 6

6.4. Conclusion

In view of the current situation taking place throughout the world, in particular the Middle East with regard to the Palestine problem and Kurdish issue for independence, it is highly relevant to revisit the concept of self-determination, liberation movements and Terrorism. At the end, this thesis are able to carry out some final considerations on the comprehensive phenomenon of international terrorism, which today more than ever attracts the attention of the entire international community. In the light of the most recent terrorist events claimed by the jihadist terrorism of the Islamic State, the States have once again been faced with their weaknesses and the inability to effectively counter the terrorist threat. Governments have taken note of the limitations and gaps in international law and their internal legislation and are working more than ever to resolve issues left unresolved to date.

At the centre of the problem there is a need for a universally agreed definition of terrorism that definitively resolves the debates on the subject in order to standardize international cooperation in the fight against terrorism. In fact, this thesis have tried to illustrate how conventional law offers a very inconsistent legal framework due to limited and sectorial counter-terrorism tools that are not able to respond to the many situations of violence that can be hypothesized and which exclude terrorism hypotheses from their field during armed conflicts.

Although a customary norm has emerged that has highlighted some essential elements of the crime of international terrorism, at least in times of peace, it does not seem sufficient to cover the multiple forms in which terrorism can manifest itself. In this context, the meeting and dialogue between States is desirable to complete the draft of a Global Convention on International Terrorism, which has been the subject of debate and internal issue at the United Nations, which has managed to regulate those gray areas that have remained uncertain for many years. Since brings the theme of terrorism back to the scope of the law by delimiting the boundaries with respect to conduct deemed legitimate by other sources of criminal, military or humanitarian law.

Although the threat of today's terrorism can certainly not be defeated only through legal instruments and legal definitions, the reference to international humanitarian law in the Draft of a Global Convention could resolve the question of the relationship between the IHL and the international counter-terrorism instruments that have generated uncertainties on the classification of acts of terrorism in the hypotheses examined.

In fact, after September 11th and the beginning of the so-called "global war on terror", the international community also questioned the effectiveness of the UN to face the new challenges of terrorism. With this paper we have tried to analyze the aspects related to terrorist violence in the course of armed conflicts, which can be implemented by non-state groups and even regular armed forces. In the International Humanitarian Law (IHL) there is a general ban on carrying out terrorist acts against the civilian population with the aim of terrorizing or bending Governments towards a certain political line. In this context, the prohibitions are aimed at both civilians and combatants of the state or non-state armed forces, whether they are legitimate or illegitimate. Unlike the anti-terrorism Conventions, the IHL does not prohibit attacks on enemy combatants or military and government property, and indeed there is a real right of legitimate fighters to participate directly in hostilities, without prejudice to the prohibition of committing betrayal.

Numerous problems revolve around the application of the IHL to the violence involving terrorist groups in the context of a conflict. States often resort to extensive application practices and interpretations of articles 2 and 3 common to the Geneva Conventions of 1949 to frame transnational situations legally in order to extend humanitarian protection. The need for the existing categories of conflicts to be adapted through a different interpretation of armed conflict or to negotiate a new regime of norms that guarantees greater protection is felt by many parties, including the International Red Cross Committee. If these problems of classification are added then the fact that states not to bind themselves to the obligations imposed by the IHL tend not to recognize the existence of a conflict within them and to classify as mere tensions internal hostilities becomes even more complicated framework of the repression of terrorism. Indeed, the solution of the issues is left to the understanding of the individual States that privilege the national sources and the international anti-terrorist treaties of which they belong, which are an alternative regime to that of international humanitarian law, rather than cooperating and making effective the instruments of international humanitarian law. States could not simply declare that a situation represents an armed conflict based on political preferences, but in practice it is what happens. For the time being, we can conclude that, despite the uncertainties and unlike international anti-terrorism treaties, the IHL is the result of a long and gradual consensus path that offers an adequate framework to the contemporary armed conflicts examined, so any attempt by States to weaken its brought to avoid the obligations it provides, it seems contradictory and meaningless. A clear definition is needed to determine the situations of "terrorism" and to clearly distinguish the terrorist from the terrorist is not to be able to determine the application

of the relevant regulations. International humanitarian law protects all persons involved in armed conflict, including suspected terrorists and those accused or convicted of acts of terrorism.

In the current fight against terrorism, while on the one hand the United States claims to employ the IHL of international conflicts, on the other hand they do not feel bound to respect many of the obligations prescribed by it and, above all, do not recognize any right to their enemies considered terrorists. It would therefore be necessary for states to endeavour to respect and implement the existing rules and to ensure that all parties to the conflict, including terrorists, respect them, granting them certain rights. The great political, juridical and moral challenge consists in finding the way to manage the new forms of violence while preserving the already established protection rules to avoid gaps and gaps in protection.

Finally, the adaptation of international law to new generations of international conflicts and changes in international politics is the keystone of the fight against terrorism. A reflection on the paramount importance of law and the need to complement national and international laws and jurisdictions is a second step in the process of adaptation to arrive at a new international order that puts all States on the same equality balance in terms of responsibility, decision-making power and international commitments. In the unprecedented development of international conflicts, it is therefore necessary to adopt a treatment and a policy adapted to our time. To update the law, the international community must first take into account the specificity of each state, then study and try to solve the underlying causes of international crime. However, the task seems difficult when you consider the number of countries concerned and their diversity of the representation of States within the UN especially when it comes to their decision-making power. Whether, terrorism in a national affair or an international affair for the peace of whole humanity it should be tackled in way that would be the best for whole humanity. Terrorism should be tackled in such a way that peace and prosperity will be seen by the whole world and that peace will also be enjoyed by coming generations.

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